(1)

Supreme Court, U.S.
FILED

02 801 NOV 19 2002

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

PENNSYLVANIA DEPARTMENT OF CORRECTIONS,
Petitioner

v.

GEORGE KOSLOW, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

D. MICHAEL FISHER
Attorney General
Commonwealth of Pennsylvania

JOHN G. KNORR, III
Chief Deputy Attorney General
Counsel of Record

CALVIN R. KOONS
Senior Deputy Attorney General

Office of Attorney General
15th Floor, Strawberry Sq.
Harrisburg, PA 17120
(717) 787-1144

72 pp

QUESTION PRESENTED

Whether Congress may validly require a state agency, as a condition of receiving any federal grants, to waive its Eleventh Amendment rights in suits brought under Section 504 of the Rehabilitation Act?

PARTIES TO THE PROCEEDING

Petitioner is the Pennsylvania Department of Corrections.

The respondents are George Koslow, the plaintiff in the District Court; and the United States, which intervened as an appellant in the Court of Appeals.[1]

---

[1]PHICO Services Company and CompServices, Inc., were also parties to the proceedings in the Court of Appeals. *See* Pet. App. 31a-35a. We believe that they have no interest in the outcome of this petition, and are serving and filing the notice required by Sup. Ct. R. 12.6. Donald T. Vaughn, who is represented by counsel for the petitioner, was likewise a party below but has no interest in the outcome of this petition.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

I. The Validity of Congressional Attempts to Compel the States to Waive Their Eleventh Amendment Rights Presents an Important and Recurrent Question of Constitutional Law Which the Court Has Not, but Should, Address 7

II. The Court Should Resolve the Tension Which Exists Between its "Unconstitutional Conditions" Decisions and Dicta in the *Alden* and *College Savings Bank* Cases 10

CONCLUSION 15

TABLE OF AUTHORITIES

Cases **Page**

Alden v. Maine,
527 U.S. 706 (1999) 6, 7, 13-15
Barron v. Burnside,
121 U.S. 186 (1887) 12
Bd. of Ed. of Oak Park v. Kelly E.,
207 F.3d 931 (7th Cir. 2000) 8
Cherry v. Univ. of Wis. System Bd. of Regents,
265 F.3d 541 (7th Cir. 2001) 15
Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,
527 U.S. 666 (1999) 6, 8, 13-15
Douglas v. Cal. Dept. of Youth Auth.,
271 F.3d 812 (9th Cir. 2001),
cert. denied, 122 S.Ct. 2591 (2002) 9
Doyle v. Continental Insurance Co.,
(1876) 12
Frost & Frost Trucking Co. v. Railroad Comm'n of California,
271 U.S. 583 (1926) 6, 10, 13
Garcia v. S.U.N.Y. Health Science Center,
280 F.3d 98 (2d Cir. 2001) 9
Garrett v. Univ. of Alabama,
— F.Supp.2d —, 2002 WL 31005200
(N.D. Ala., Sept. 4, 2002) 9
Gerhardt v. Lazaroff,
221 F.Supp.2d 827 (S.D. Ohio 2002) 8
Hess v. Port Auth. Trans-Hudson Corp.,
513 U.S. 30 (1994) 15
Home Insurance Co. v. Morse,
87 U.S. 445 (1874) 12, 13
Jim C. v. United States,
235 F.3d 1079 (8th Cir.)(en banc),
cert. denied sub nom.

Arkansas Dept. of Education v. Jim C.,
533 U.S. 949 (2001) 5, 9, 15
Kimel v. Fla. Bd. of Regents,
528 U.S. 62 (2000) 8
Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,
440 U.S. 391 (1979) 15
Legal Services Corp. v. Velazquez,
531 U.S. 533 (2001) 11
Nihiser v. Ohio Environmental Protection Agency,
269 F.3d 626 (6th Cir. 2001),
cert. denied, 122 S.Ct. 2588 (2002) 9
Paul v. Virginia,
75 U.S. 168 (1868) 11
Pennhurst State School & Hosp. v. Halderman,
465 U.S. 89 (1984) 12
Petty v. Tennessee-Missouri Bridge Comm'n,
359 U.S. 275 (1959) 14, 15
Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.,
506 U.S. 139 (1993) 7
Robinson v. Kansas,
295 F.3d 1183 (10th Cir. 2002) 15
Security Mut. Life Insurance Co. v. Prewitt,
202 U.S. 246 (1906) 12
Seminole Tribe of Fla. v. Florida,
517 U.S. 44 (1996) 8
South Dakota v. Dole,
483 U.S. 203 (1987) 7, 14
Terral v. Burke Construction Co.,
257 U.S. 529 (1922) 12, 13
Thomas v. Review Bd. of Indiana Employment Security Div.,
450 U.S. 707 (1981) 13
U.S. Term Limits, Inc., v. Thornton,
514 U.S. 779 (1995) 13

U.S. v. South-Eastern Underwriters' Ass'n.,
322 U.S. 533 (1944) 11
United States Steel v. Multistate Tax Comm'n,
434 U.S. 452 (1978) 14
University of Alabama v. Garrett,
531 U.S. 356 (2001) 4
Vinson v. Thomas,
288 F.3d 1145 (9th Cir. 2002),
petition for cert. filed sub nom.
Hawaii v. Vinson, No. 01-1878
(June 27, 2002) 9
Western and Southern Life Insurance Co. v. State Bd. of Equalization of California,
451 U.S. 648 (1981) 13

Statutes and Rules

28 U.S.C. § 1254(1) 1
29 U.S.C. § 794 ..... i, 1-4, 8, 9
29 U.S.C. §§ 720-728a 3
42 U.S.C. § 2000d-7 ..... 2, 4, 5, 7, 9-11
42 U.S.C. §§ 12111-12213 4
Pa. Stat. Ann., tit. 43, §§ 951-963 (Purdon 1991) ... 4
Sup. Ct. R. 12.6 ii

Constitutional Provisions

U.S. CONST., Art. I, § 8, cl. 1 ..... 1, 5
U.S. CONST., Art. I, § 10, cl. 3 14
U.S. CONST., Amend. XI ..... *passim*

Other Authorities

R. Epstein, "Unconstitutional Conditions, State Power, and the Limits of Consent," 102 HARV.L.REV. 4 (1988) 10, 11
The Federalist No. 39
(B. Wright ed. 1961) (J. Madison) 7

OPINIONS BELOW

The Court of Appeal's opinion is reported at 302 F.3d 161 and is reprinted at in the appendix to this petition ("Pet. App.") at 1a. The District Court's opinion, together with a memorandum opinion denying reconsideration, is reported at 158 F.Supp.2d 539 and is reprinted at Pet. App. 36a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on August 21, 2002, and this petition is being filed within 90 days thereafter. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, § 8, cl. 1 of the Constitution, known as the "Spending Clause," provides in relevant part that Congress shall have the power "[t]o lay and collect taxes ... to pay the debts and provide for the common defense and general welfare of the United States...."

2. The Eleventh Amendment to the Constitution provides that:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

3. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, provides in relevant part that

> (a) No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
>
> (b) For the purposes of this section, the term "program or activity" means all the operations of ... a department, agency ... or other instrumentality of a State or local government ... any part of which is extended Federal financial assistance.

4. 42 U.S.C. § 2000d-7(a)(1) provides in relevant part that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act...."

STATEMENT OF THE CASE

This case presents an important constitutional issue regarding the ability of Congress to use its economic power to force the States to waive their Eleventh Amendment immunity from private lawsuits. The petitioner is the Pennsylvania Department of Corrections, an agency of the Commonwealth of Pennsylvania. The respondents are George Koslow, formerly an employee of the Department, and the United States, which intervened in the Court of Appeals.

1. Section 2000d-7(a)(1) of Title 42 provides that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act...." In turn, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, broadly prohibits

discrimination on the basis of disability under any "program or activity" which receives federal financial assistance. The breadth of this prohibition is enhanced by two factors. First, while the Rehabilitation Act is itself a source of federal funding grants, *see, e.g.*, 29 U.S.C. §§ 720-728a (grants to States for vocational rehabilitation programs), Section 504's prohibition is not limited to recipients of these grants, but rather extends to "*any* program or activity receiving federal financial assistance." 29 U.S.C. § 794(a) (emphasis added). Second, Section 504 defines "program or activity" expansively, to include "*all* the operations of ... a[n] agency ... of a State ... any part of which is extended Federal financial assistance." *Id.*, § 794(b) (emphasis added). Thus, an agency which receives any federal funding for any purpose, is subject to Section 504 in all of its operations, and to the loss of its Eleventh Amendment immunity in any suit alleging a violation of Section 504.

Respondent Koslow worked for the Department of Corrections, a recipient of federal funds, from 1988 to 2000, as a water treatment specialist at the State Correctional Institution at Graterford. In June of 1995, he suffered a work-related injury to his back, allegedly as the result of lifting 80-pound bags of salt into an industrial water softener. He reinjured his back in September of 1995, and again in November of 1996. Respondent alleges that he was denied the accommodation that he needed to continue to perform his job, and was ultimately terminated from his employment in February of 2000. Pet. App. 3a-4a.

2. Koslow brought this action in the District Court, against petitioner and others,[2] asserting that his termination violated Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and other statutes.[3] Petitioner asserted its Eleventh Amendment immunity as to all of Koslow's claims, and after discovery, the District Court directed briefing on Eleventh Amendment issues in light of the Court's then-recent decision in *University of Alabama v. Garrett*, 531 U.S. 356 (2001). Pet. App. 38a. In response, the petitioner moved for summary judgment on all of Koslow's clams, which the District Court granted.[4] Pet. App. 39a-44a.

As to Koslow's claim under the Rehabilitation Act, the District Court held that Congress, in 42 U.S.C. § 2000d-7(a)(1), had "unequivocally expressed" its intention

---

[2]He sued, in addition to the petitioner, the Superintendent of the Graterford prison, and PHICO Services Company and CompServices, Inc., which had administered the prison's workers' compensation program. Pet. App. 4a.

[3]Respondent also asserted claims under Title I (employment) and Title II (public services) of the Americans with Disabilities Act, 42 U.S.C. §§ 12111-12213 (ADA); and under the Pennsylvania Human Relations Act, Pa. Stat. Ann., tit. 43, §§ 951-963 (Purdon 1991). None of these claims is before the Court. As to most of his claims, Koslow sought both damages and reinstatement, but with respect to his claim under the Rehabilitation Act, he sought only damages. *See* the Appendix filed in the Court of Appeals, at 234-237, 239 (reprinting second amended complaint).

[4]The other defendants — Superintendent Vaughn, PHICO Services and Compservices — likewise moved for summary judgment on the surviving claims against them. (The District Court had earlier dismissed Koslow's state-law claim against PHICO Services. *See* Pet. App. 45a.) The District Court granted these motions as well. Pet. App. 39a-41a, 44a-45a.

to require the States to waive their Eleventh Amendment immunity from suit as a condition of receiving federal funds. Pet. App. 41a. But in the District Court's view, this attempt exceeded Congress' power under the Spending Clause, because "there is [no] connection between federal funds received by the state and [the] Rehabilitation Act claim." Pet. App. 44a. The District Court therefore held that Koslow's Rehabilitation Act claim was barred by the Eleventh Amendment. Pet. App. 41a-44a, *citing Jim C. v. United States*, 235 F.3d 1079, 1082(8th Cir.)(en banc) (Bowman, J., dissenting), *cert. denied sub nom. Arkansas Dept. of Education v. Jim C.*, 533 U.S. 949 (2001).

3. In the Court of Appeals, the United States intervened to defend the constitutionality of Section 2000d-7(a)(1), and the Court of Appeals reversed the District Court's decision on the Rehabilitation Act claim.[5] The Court of Appeals agreed with the District Court that, in enacting Section 2000d-7, Congress' intentions were unambiguous: "Congress put states on notice that by accepting federal funds under the Rehabilitation Act, they would waive their Eleventh Amendment immunity to Rehabilitation Act claims." Pet. App. 13a-14a. Unlike the District Court, however, the Court of Appeals held that Congress, in requiring such a waiver as a condition of federal funding, had not exceeded its powers under the Spending Clause.

Petitioner had argued, among other things, that requiring the States to waive their Eleventh Amendment

---

[5]The Court of Appeals likewise reversed the District Court's holding that Koslow had failed to state a claim for prospective injunctive relief against the Superintendent of Graterford Prison under Title I of the ADA. Pet. App. 26a-32a. The District Court's other rulings were either not appealed, Pet. App. 5a-6a, or were affirmed by the Court of Appeals. Pet. App. 32a-37a.

rights ran afoul of the Court's "unconstitutional conditions" doctrine: that the government "may not impose conditions which require the relinquishment of constitutional rights." *Frost & Frost Trucking Co. v. Railroad Comm'n of California*, 271 U.S. 583, 593 (1926). The Court of Appeals recognized that "the 'unconstitutional conditions' doctrine boasts a long history reaching into more contemporary decisions," Pet. App. 20a n.13, but rejected its application here, because "the Supreme Court has not yet applied the 'unconstitutional conditions' doctrine to cases between two sovereigns." Pet. App. 21a.

Rather, the Court of Appeals relied principally on dicta from the Court's decisions in *Alden v. Maine*, 527 U.S. 706, 755 (1999), and *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999), suggesting that Congress could condition federal funding on the relinquishment of Eleventh Amendment immunity.[6] Pet. App. 20a. The Court of Appeals likewise invoked the general principle that the States' Eleventh Amendment rights may, like other constitutional rights, be waived; and the general principle that Congress may attach conditions to federal grants, including grants to the States. Pet. App. 21a & n.14. Finally, the Court of Appeals observed that Pennsylvania "could avoid § 504 suits against the Department of Corrections by declining all federal funds to the Department." Pet. App. 22a. In the Court of Appeals' view, since the Commonwealth remained free to make this

---

[6]The Court of Appeals first incorrectly said that the Court had "held" as much, but immediately recognized that "[t]he Eleventh Amendment issue ... was not precisely before the Supreme Court in *Alden* or *College Savings Bank*." Pet. App. 20a-21a.

choice, Section 2000d-7(a)(1) did not embody an "unconstitutional condition." *Ibid.*[7]

REASONS FOR GRANTING THE WRIT

I. The Validity of Congressional Attempts to Compel the States to Waive Their Eleventh Amendment Rights Presents an Important and Recurrent Question of Constitutional Law Which the Court Has Not, but Should, Address.

The Eleventh Amendment[8] is not merely a "fundamental constitutional protection" for the States, *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993), but also reflects a structural principle of the federal system established by the Constitution. The States retain "a residual and inviolable sovereignty," The Federalist No. 39, p. 285 (B. Wright ed. 1961) (J. Madison), and the Constitution "reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." *Alden v. Maine*, 527 U.S. at 714. The question presented by this case thus involves not merely the proper limits on the congressional spending power, but also the proper

---

[7]The Court of Appeals likewise rejected the idea, which the District Court had accepted, that Section 2000d-7(a)(1)'s waiver requirement exceeded "the outer parameters of the 'germaneness' or 'relatedness' limitation on the imposition of conditions under the spending power." Pet. App. 24a, *quoting South Dakota v. Dole*, 483 U.S. 203, 208 n.3 (1987).

[8]We use the phrase "Eleventh Amendment" as a "convenient shorthand," *Alden v. Maine*, 527 U.S. at 713, for the broader principles of sovereign immunity which are reflected in, but neither derived from nor limited by, the literal terms of the Eleventh Amendment.

relationships among Congress, the federal judiciary and the States.

In recent years, the Court has repeatedly confirmed that the Constitution places real limits on Congress' ability to abrogate the States' Eleventh Amendment immunity. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (Congress lacks power under Article I to abrogate States' immunity); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (Congress has only limited power under Section 5 of Fourteenth Amendment to abrogate States' immunity); *University of Alabama v. Garrett, supra* (same). In light of these decisions, the focus of efforts to overcome the States' immunity has shifted away from theories of abrogation, toward theories of waiver. *See Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (rejecting theory of "constructive waiver"). This case presents the most common current variant of those theories: the idea that Congress may compel the States to waive their immunity, simply by making it a condition for receiving federal funding.

The validity of such provisions has arisen in a variety of contexts. *See, e.g., Bd. of Ed. of Oak Park v. Kelly E.*, 207 F.3d 931, 935 (7th Cir. 2000) (Individuals with Disabilities Education Act); *Gerhardt v. Lazaroff*, 221 F.Supp.2d 827, 851-52 (S.D. Ohio 2002) (Religious Land Use and Institutionalized Persons Act). But it has arisen most persistently in cases arising under Section 504 of the Rehabilitation Act. Section 504, as it applies to employment discrimination, is virtually identical in substance to Title I of the Americans with Disabilities

Act[9]; and in the wake of the Court's decision in *Garrett* that States are immune from claims under Title I, more and more courts have had to confront the validity of Section 2000d-7's waiver-of-immunity provision in this context. *See, e.g., Douglas v. Cal. Dept. of Youth Auth.*, 271 F.3d 812 (9th Cir. 2001) (waiver-of-immunity provision valid), *reh'g denied*, 285 F.3d 1226 (four judges dissenting), *cert. denied*, 122 S.Ct. 2591 (2002);[10] *Jim C. v. United States, supra* (same, four judges dissenting), *cert. denied*, 533 U.S. 949 (2001); *Nihiser v. Ohio Environmental Protection Agency*, 269 F.3d 626 (6th Cir. 2001), *cert. denied*, 122 S.Ct. 2588 (2002) (same). *Cf. Garcia v. S.U.N.Y. Health Science Center*, 280 F.3d 98 (2d Cir. 2001) (state could not have made knowing waiver); *Garrett v. Univ. of Alabama*, -- F.Supp.2d —, 2002 WL 31005200 (N.D. Ala., Sept. 4, 2002) (same).

The Court should therefore resolve this issue, which otherwise seems likely to continue to recur. The need for the Court's guidance is all the more pressing since, as we now explain, many of the lower courts are deciding this issue by relying on comments from the Court which, while recent, occur only in dicta and are difficult to harmonize with a large and long-standing body of the Court's decisions.

---

[9]"The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act." 29 U.S.C. § 794(d).

[10]A petition for certiorari is pending from a later Ninth Circuit decision which follows *Douglas*. *Vinson v. Thomas*, 288 F.3d 1145 (9th Cir. 2002), *petition for cert. filed sub nom. Hawaii v. Vinson*, No. 01-1878 (June 27, 2002).

II. The Court Should Resolve the Tension Which Exists Between its "Unconstitutional Conditions" Decisions and Dicta in the *Alden* and *College Savings Bank* Cases.

In one sense, the constitutional problem presented by Section 2000d-7's waiver-of-immunity provision is not a new one. Governments, both state and federal, have on many occasions sought to evade the limits which the Constitution places on their powers, either by offering benefits which are conditioned on the surrender of one constitutional right or another, or by enacting schemes which effectively penalize those who exercise those rights. For at least a century and a quarter, the Court has rejected such attempts. *See generally, e.g.*, R. Epstein, "Unconstitutional Conditions, State Power, and the Limits of Consent," 102 HARV.L.REV. 4 (1988).

The Court's classic formulation of this "unconstitutional conditions" doctrine appears in *Frost & Frost Trucking Co. v. Railroad Comm. of California*, 271 U.S. 583 (1926):

> [T]he state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United State may thus be manipulated out of existence.

Id., at 593-94. Over the years, the Court has invoked the doctrine to protect a wide spectrum of constitutional

rights in a wide variety of contexts, *see, e.g.*, Epstein, "Unconstitutional Conditions," 102 HARV.L.REV. at 11 & nn. 15-21, including conditions placed upon federal financial grants. *See, e.g., Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) (Congress may not condition funding for legal services for the indigent on lawyers refraining from challenging constitutionality of statutes).

But the earliest applications of the doctrine came in response to state laws which are strikingly similar to the waiver-of-immunity condition in Section 2000d-7: laws, that is, which sought to compel the waiver of an immunity from suit in return for the bestowal of an economic benefit. In the mid-nineteenth century, the Court had repeatedly held that a foreign corporation — that is, a corporation chartered by another State — could be excluded entirely from doing business within other States; and that permission to do business, if extended at all, might be granted "upon such terms and conditions as those States may think proper to impose." *See, e.g., Paul v. Virginia*, 75 U.S. 168, 182 (1868), *overruled in part on other grounds, U.S. v. South-Eastern Underwriters' Ass'n.*, 322 U.S. 533 (1944). A number of states then enacted laws which required foreign corporations, as a condition of doing business, to submit to the jurisdiction of the state courts: foreign corporations had to agree that they would not invoke the federal removal statute in cases brought against them in the state courts, and would not themselves file federal cases against local residents under the federal courts' diversity jurisdiction. The States, in other words, sought to use their economic leverage to force certain litigants to waive their immunity from suit

in *state* court,[11] just as Congress, in this case, seeks to use its economic leverage to force the States to waive their immunity from suit in *federal* court.

In a series of cases stretching over half a century, the Court struck down these laws as attempts to impose unconstitutional conditions. *See Home Insurance Co. v. Morse*, 87 U.S. 445 (1874); *Barron v. Burnside*, 121 U.S. 186 (1887); *Terral v. Burke Construction Co.*, 257 U.S. 529 (1922). In two other cases, the Court upheld such laws over vigorous dissents, *see Doyle v. Continental Insurance Co.*, 94 U.S. 535, 543 (1876) (Bradley, J., dissenting); *Security Mut. Life Insurance Co. v. Prewitt*, 202 U.S. 246, 258 (Day, J., dissenting) (1906), but in *Terral*, the Court overruled both *Doyle* and *Prewitt*, and adopted the dissenters' views as its own. *Terral*, 257 U.S. at 533.[12]

The Court recognized that the States could, if they wished, exclude foreign corporations entirely, *e.g., Terral*, 257 U.S. at 532; and recognized as well that a foreign corporation might, in any given lawsuit, decide to waive its removal rights. *E.g., Barron*, 121 U.S. at 199. Nevertheless, the Court was firm that

---

[11]There is, of course, nothing odd about using the term "immunity" in this context. As the Court has pointed out, the concept of immunity embraces not only *whether* one is sued but *where* one is sued. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984).

[12]Justice Bradley's dissent in *Doyle* appears to contain the first use of the phrase "unconstitutional conditions." "Though a State may have the power ... of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so." *Id.*, at 543 (Bradley, J., dissenting).

> a state may not, in imposing conditions upon a foreign corporation[]..., exact from it a waiver of the exercise of its constitutional right to resort to the federal courts ... whether waived in advance or not.

Terral, 257 U.S. at 532. Nor did it matter that a foreign corporation might have agreed to abide by the statute: "The agreement of the insurance company ... is void, as it would be had no such statute been passed." *Morse*, 87 U.S. at 458.

Since at least 1874, then, the Court has adhered to the principle that "a person may not be compelled to choose between the exercise of a [constitutional] right and participation in an otherwise available public program." *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981). *Frost & Frost Trucking Co.'s* observation that "[i]t is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence," 271 U.S. at 594, has been quoted with approval as recently as 1981, *see Western and Southern Life Insurance Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 657-65 (1981); and *Terral* has been cited as recently as 1995. *See U.S. Term Limits, Inc., v. Thornton*, 514 U.S. 779, 843 (1995) (Kennedy, J., concurring).

Nevertheless, the Court has never directly considered whether the compulsory surrender of the States' Eleventh Amendment rights, as a condition of receiving federal financial grants, is an "unconstitutional condition." The Court has twice suggested, in dicta, that federal funding to the States may be conditioned on such waivers. *See Alden v. Maine*, 527 U.S. 706, 755 (1999); *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999). But neither *Alden*

nor *College Savings* confronted the question directly, and neither *Alden* nor *College Savings* considered the point in connection with the Court's "unconstitutional conditions" decisions.

Rather, the dicta in *Alden* and *College Savings* relied on *South Dakota v. Dole*, 483 U.S. 203 (1987). *Alden*, 527 U.S. at 755; *College Savings*, 527 U.S. at 686. *Dole* did reaffirm the general proposition that Congress may attach conditions to its financial grants, *id.*, at 206-08, but *Dole* did not involve any attempt to compel the surrender of a *constitutional* protection such as Eleventh Amendment immunity. To the contrary, the Court in *Dole* rejected the idea that the funding condition at issue — raising the minimum drinking age to 21 — infringed on any constitutional prerogative of the States. *Id.*, at 209-10. The Court in *Dole* thus had no occasion to consider whether, or under what circumstances, Congress could compel the waiver of such a constitutional protection.

The dicta in *College Savings* relied likewise on *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), where the Court held that a bi-state commission, created pursuant to an interstate compact, had waived its asserted Eleventh Amendment immunity by "reason of a suability provision attached to the congressional approval of the compact." *College Savings*, 527 U.S. at 686. The waiver in *Petty*, however, arose in the context of the unique concerns which animate the Compacts Clause. Those interstate agreements which require congressional approval under the Compacts Clause are, by definition, those which enhance the power of the compacting States and encroach on that of the United States, *United States Steel v. Multistate Tax Comm'n*, 434 U.S. 452, 468 (1978); and the Compacts Clause supplies "a mechanism of legal control over affairs that are projected beyond State lines

and yet may not call for, nor be capable of, national treatment." *Petty*, 359 U.S. at 282 n. 7. The state financial and dignitary interests which underlie Eleventh Amendment immunity are thus only minimally implicated in such cases; indeed, for this very reason, the Court later held that Compact Clause entities are ordinarily not state agencies at all for Eleventh Amendment purposes. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). *Petty* has thus been, if not overruled, at least overtaken by later decisions.

The dicta from *Alden* and *College Savings* thus have little real support in the Court's earlier decisions, and stand in undeniable tension with the Court's "unconstitutional conditions" decisions. Nevertheless, the Court of Appeals, citing the lack of guidance from this Court — "the Supreme Court has not yet applied the 'unconstitutional conditions' doctrine to cases between two sovereigns," Pet. App. 21a — simply declined to apply those decisions to this case, and instead relied uncritically upon the dicta from *Alden* and *College Savings*. Other courts have done the same. *See, e.g., Robinson v. Kansas*, 295 F.3d 1183, 1190 (10th Cir. 2002); *Cherry v. Univ. of Wis. System Bd. of Regents*, 265 F.3d 541, 554 (7th Cir. 2001); *Jim C. v. United States*, 235 F.3d at 1081. The Court should take this opportunity to resolve this tension between its decisions and its dicta, and to provide much-needed guidance on the proper approach to this important issue.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

D. MICHAEL FISHER
Attorney General
Commonwealth of Pennsylvania

JOHN G. KNORR, III
Chief Deputy Attorney General
Counsel of Record

CALVIN R. KOONS
Senior Deputy Attorney General

Office of Attorney General
15th Floor, Strawberry Sq.
Harrisburg, PA 17120
(717) 787-1144

COUNSEL FOR PETITIONER

November 19, 2002

PRECEDENTIAL

Filed August 21, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2782

GEORGE KOSLOW,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA d/b/a DEPARTMENT OF CORRECTIONS; DONALD T. VAUGHN;
PHICO SERVICES COMPANY; COMPSERVICES, INC.

On Appeal from the United States District Court for the Eastern District of Pennsylvania D.C. Civil Action No. 97-cv-05951 (Honorable John P. Fullam)

Argued March 5, 2002

Before: SCIRICA and ROSENN, *Circuit Judges*, and WARD, *District Judge*[*]

(Filed: August 21, 2002)

---

[*]The Honorable Robert J. Ward, United States District Judge for the Southern District of New York, sitting by designation.

JEFFREY CAMPOLONGO, ESQUIRE
(ARGUED)
THOMAS M. HOLLAND, ESQUIRE
Grace Hall
1522 Locust Street
Philadelphia, Pennsylvania 19102
Attorneys for Appellant

SETH M. GALANTER, ESQUIRE
(ARGUED)
SARAH E. HARRINGTON, ESQUIRE
United States Department of Justice
Appellate Section
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Attorneys for Intervenor-Appellant, United States of America

JOHN G. KNORR, III, ESQUIRE
(ARGUED)
Office of Attorney General of Pennsylvania
Department of Justice
Strawberry Square, 15th Floor
Harrisburg, Pennsylvania 17120

Attorney for Appellees, Commonwealth of Pennsylvania D/b/a Department of Corrections; Donald T. Vaughn

ELIZABETH A. MALLOY, ESQUIRE
(ARGUED)
Klett, Rooney, Lieber & Schorling
Two Logan Square, 12th Floor
18th and Arch Streets
Philadelphia, Pennsylvania 19103
Attorney for Appellee, PHICO Services Company

HOWARD R. FLAXMAN, ESQUIRE

(ARGUED)
Fox, Rothschild, O' Brien & Frankel
2000 Market Street, 10th Floor
Philadelphia, Pennsylvania 19103
Attorney for Appellee Compservices, Inc.

OPINION OF THE COURT

SCIRICA, *Circuit Judge.*

In this disability discrimination case under the Rehabilitation Act, the principal issue on appeal is whether the Commonwealth of Pennsylvania waived its sovereign immunity by accepting certain federal funds for the Department of Corrections. We will reverse in part and affirm in part.

I.

In October 1988, George Koslow was hired by the Pennsylvania Department of Corrections as a water treatment plant supervisor for the State Correctional Institute in Graterford, Pennsylvania ("SCI-Graterford"), a state prison receiving federal funds under the State Criminal Alien Assistance Program (SCAAP). On June 6, 1995, Koslow injured his lower back loading eighty-pound salt bags into SCI-Graterford's industrial water softener, then reinjured his back performing the same task in September 1995 and November 1996. On each occasion Koslow notified SCI-Graterford's Human Resources Department of his condition, requesting relief from lifting the salt bags and walking stairs. On June 10, 1997, after an investigation, SCI-Graterford officials informed Koslow he either had to return to work at full duty or be placed on workers' compensation leave. Koslow chose the former, remaining in a position at work that required stair climbing. On February 29, 2000, he

was dismissed for being unable to perform "essential functions" of his job.[1]

Koslow alleged the Commonwealth of Pennsylvania and SCI-Graterford Superintendent Donald Vaughn (collectively, the "Commonwealth defendants") refused to accommodate his disability, violating the Americans With Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, and the Pennsylvania Human Relations Act (PHRA), 42 Pa. Cons.Stat. Ann. § 951 *et seq.* Koslow also alleged PHICO Services Co. and CompServices, Inc., his past and present worker's compensation administrators, had wrongfully processed his compensation claims.[2] He sought reinstatement and damages.

The District Court granted summary judgment to PHICO and CompServices on Koslow's PHRA and ADA claims, finding that as "agents" of Koslow's "employers," they played no decisionmaking role regarding Koslow's employment. The District Court stayed the remainder of Koslow's action pending resolution of Board of Trustees of the *University of Alabama v. Garrett*, 531 U.S. 356, 121 S.Ct. 955 (2001), then before the United States Supreme Court, which held Congress's abrogation of states' Eleventh Amendment immunity under Title I of the ADA was invalid. *Id.* at 965-68.

With the benefit of *Garrett* and after further

---

[1]Because of the procedural posture of the case, the record is unclear regarding what "essential functions" Koslow was unable to perform.

[2]From 1995 through 1997, PHICO acted as SCI-Graterford's agent in administering its workers' compensation scheme. In December 1997, CompServices replaced PHICO.

briefing, the District Court granted the Commonwealth defendants' motions for summary judgment on Koslow's ADA claims. The District Court found neither the ADA nor the Rehabilitation Act abrogated the Commonwealth's sovereign immunity. It also held the Commonwealth defendants had not waived sovereign immunity on the Rehabilitation Act claims. Therefore, Koslow could not state valid Title I claims against the Department of Corrections under either statute. Nor, the District Court found, could Koslow pursue injunctive relief against SCI-Graterford Superintendent Vaughn under Title I of the ADA. After disposing of Koslow's Title I claims, the District Court also dismissed Koslow's claim under Title II of the ADA. The latter claim is not pursued on appeal.[3]

---

[3]Title I of the ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Koslow asserted ADA claims under Title I (employment) and Title II-A (public services). As noted, in *Garrett*, the Supreme Court held Congress's abrogation of states' Eleventh Amendment immunity under Title I of the ADA was invalid. 121 S.Ct. at 965-68. But the Supreme Court held that state officials could be subjected to federal court actions for injunctive relief in violation of Title I. *Id.* at 968 n. 9 ("Those standards can be enforced by the United States in actions for money damages as well as by private individuals in actions for injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908)).

As to ADA claims under Title II, the District Court offered two justifications for its dismissal. First, the Court held Title I of the ADA is the "sole avenue for pursuing employment discrimination claims based on disability. Title I expressly deals with employment discrimination, while Title II deals with 'services, programs, or activities of a public entity' ..." Op. at 2 (suggesting this Court "avoided" deciding whether Title II of the ADA allows for an employment discrimination claim based on

As noted, the District Court had already dismissed Koslow's PHRA claims against PHICO and CompServices, holding they had played no "decisionmaking" role. This appeal focuses solely on Koslow's Rehabilitation Act claims against the Commonwealth defendants, his Title I claim for injunctive relief under the ADA against SCI-Graterford Superintendent Vaughn, and his PHRA claims against PHICO and CompServices.

II.

The District Court had jurisdiction over Koslow's federal claims under 28 U.S.C. §§ 1331 and 1343 and supplemental jurisdiction on his state law claims under 28 U.S.C. § 1367. We have jurisdiction under 28 U.S.C. § 1291.

III.

Certain background information on the federal fiscal connection to the Pennsylvania Department of Corrections, Koslow's employer, is essential here. The Commonwealth of Pennsylvania receives federal funds for

---

disability in *Lavia v. Pennsylvania*, 224 F.3d 190, 194 n. 2 (3d Cir.2000)) (citations omitted). Given Koslow's failure to appeal this issue, we reserve consideration of this point. The District Court also found that in enacting Title II of the ADA, Congress had not validly abrogated states' immunity. Id. at 2-3. We need not reach this issue. Koslow does contest the dismissal of his injunctive relief claims brought against SCI-Graterford Superintendent Vaughn under Title I. Section 504 of the Rehabilitation Act and Title II of the ADA offer similar protections for persons with disabilities. Although Title II applies to all state and municipal governments, § 504 applies only to those agencies or departments receiving federal funds, and § 504 applies only during the periods during which the funds are accepted.

various designated purposes. From November 1996 through February 2000, at least forty-two federal grants were provided to the Pennsylvania Department of Corrections.[4] The Commonwealth identifies twenty-five of those federal grants as "programs with multiple years of funding." One such "multiple year" program is the State Criminal Alien Assistance Program, originally established to alleviate costs states incur when illegal aliens commit state crimes and are imprisoned in state correctional facilities. Despite its stated purpose, funds received under SCAAP are not necessarily directed by the Department of Corrections toward costs for imprisoned illegal aliens. Nor need the Department of Corrections track these funds or report to the federal government where the funds are allocated. 62 Fed.Reg. 35,232 (June 30, 1997).

The record demonstrates the Commonwealth of Pennsylvania accepted federal funds under SCAAP in 1996, 1997, 1998, and 1999, the relevant dates of this litigation. The parties stipulated the Commonwealth disbursed all of those funds to the Department of Corrections.[5] Despite the stipulation, the exact amount of the federal contribution under SCAAP to the Department of Corrections or to SCI-Graterford is not

---

[4]On February 26, 2002, during a Pennsylvania Senate Appropriations Committee Hearing, one senator testified 38,425 prisoners were then incarcerated in Commonwealth prisons, at an approximate aggregate annual cost to the Commonwealth of $1,075,900,000 (estimating $28,000 per prisoner). For fiscal year 2002-03, the proposed budget for the Pennsylvania Department of Corrections is $1,295,214,000.

[5]The Department of Corrections also receives federal grant funds from the United States Department of Education, but those funds are managed and administered by a separate Department of Corrections office.

part of the record.

IV.

The most difficult issue in this appeal is whether the Commonwealth defendants waived their sovereign immunity to suit on Koslow's federal Rehabilitation Act claims. There are three related, yet separate and independent, issues--whether the Commonwealth's acceptance of SCAAP funds means it waived its Eleventh Amendment immunity for Rehabilitation Act suits against a department receiving those funds; whether the Rehabilitation Act, especially 42 U.S.C. § 2000d-7, imposes an "unconstitutional condition" on the Commonwealth's receipt of federal funds; and whether the Rehabilitation Act is valid legislation under the Spending Clause. We exercise plenary review over these questions of law, *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 694 (3d Cir.1996), and, more generally, over the grant of summary judgment. *Doe v. County of Centre*, 242 F.3d 437, 446 (3d Cir.2001).

A.

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI. The Eleventh Amendment does not explicitly apply to cases that do not involve "Citizens of another State" or "Citizens or Subjects of any Foreign State." *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) ("the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the

federal courts"). But as the Supreme Court has held for over a century, see *Hans v. Louisiana*, 134 U.S. 1, 13 (1890), the Eleventh Amendment confirms a broader "background principle of state sovereign immunity." *Seminole Tribe*, 517 U.S. at 72.

As developed, the Eleventh Amendment provides states with immunity not only from suits brought by citizens of other states, but also from suits brought by their own citizens. *Hans*, 134 U.S. at 13-14. Recent cases have emphasized the Eleventh Amendment's embodiment of this common law doctrine. *E.g., Alden v. Maine*, 527 U.S. 706, 713 (1999); *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145-46 (1993) (declaring the Eleventh Amendment a "fundamental constitutional protection ... rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity ... [and] respect owed them as members of the federation").

But a state's Eleventh Amendment protection from federal suits--whether brought by citizens of their state or another--is not absolute. Two established exceptions to the Eleventh Amendment's bar permit individuals to sue states. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999). First, Congress may authorize such a suit under its power "to enforce the Fourteenth Amendment--an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance." *Id.* (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)). Under this exception, Congress abrogates a state's sovereign immunity "when it both unequivocally intends to do so and 'act[s] pursuant to a valid grant of constitutional authority.' " *Garrett*, 531 U.S. at 363 (quoting *Kimel v. Bd. of Regents*, 528 U.S. 62, 73 (2000)). Second, a state may waive its sovereign immunity by consenting to suit. *Coll. Sav.*

Bank, 527 U.S. at 670 (citing *Clark v. Barnard*, 108 U.S. 436 (1883)); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985). Of course, in addition, a person seeking purely prospective relief against state officials for ongoing violations of federal law may sue under the "legal fiction" of *Ex parte Young*, 209 U.S. 123, 159-60 (1908), despite the text of the Eleventh Amendment. *See Alden*, 527 U.S. at 757.

At issue here is whether plaintiffs' Rehabilitation Act claims fall within one of these exceptions. Section 504 of the Rehabilitation Act prohibits discrimination on the basis of disability in federally funded programs or activities: "No otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ...." 29 U.S.C. § 794(a). In its definitional section, the statute provides:

> For the purposes of this section, the term "program or activity" means all the operations of--
>
> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or local government; or
>
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government agency) to which the assistance is extended, in the case of assistance to a State or local government;
>
> ... any part of which is extended Federal financial assistance.

29 U.S.C. § 794(b).

There have been many suits under the Rehabilitation Act against sovereign states. Indeed, "[t]he Rehabilitation Act has a long history of scrutiny under the Eleventh Amendment." *Nihiser v. Ohio EPA*, 269 F.3d 626, 628 (6th Cir.2001). In *Atascadero State Hospital*, the Supreme Court held that despite the language of § 504, it was not sufficiently clear that Congress intended states' receipt of federal funds under the statute to constitute a waiver of Eleventh Amendment immunity. 473 U.S. at 247 (finding the Act fell "far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity"). The next year, Congress amended § 504 to provide specifically that: "A state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 ...." 42 U.S.C. § 2000d- 7(a)(1).

In its sovereign immunity analysis, the District Court rejected the possibility that Congress had validly abrogated the Commonwealth's immunity under the Fourteenth Amendment. The District Court held the 1986 amendment to the Rehabilitation Act represented an "unequivocal[ ] express[ion]" of Congress's desire to abrogate states' immunity. Op. at 4. But this factor alone, the court held, was insufficient to abrogate the Department of Corrections's immunity under the Eleventh Amendment:

> The second part of the test [for abrogation], however, is "congruence and proportionality"--that is, whether Congress has identified a "pattern of discrimination by the States which violates the Fourteenth Amendment, and [whether] the remedy imposed by Congress ... is congruent and proportional to the targeted violation." *Garrett*, 121 S.Ct. at 967-68. No specific unconstitutional

> conduct by the states was identified by Congress, and therefore § 504 must fall victim to the same fate that has lately befallen other antidiscrimination statutes insofar as they are applied to the states.

Op. at 4.[6]

The District Court then considered whether the Commonwealth had waived its sovereign immunity by consenting to suit. The District Court rejected this possibility as well:

> The only way that plaintiff can assert a claim under § 504, then, is if the Commonwealth of Pennsylvania has waived its sovereign immunity. It clearly has not done so explicitly, as there is no legislation that can be so construed. In order for Pennsylvania to have implicitly waived its immunity by accepting federal funds, the conditions on the grant of money must be unambiguously expressed by Congress. Congress must also be specific; a "general authorization" does not suffice.... As plaintiff does not argue that there is any connection between federal funds received by the state and his Rehabilitation Act claim, I hold that the Commonwealth of Pennsylvania has not waived its sovereign immunity in this case.

Op. at 5-7. In reaching this result, the District Court endorsed the dissenting opinion in *Jim C. v. United*

---

[6]In support, the District Court cited *Garrett, Kimel, City of Boerne v. Flores*, 521 U.S. 507 (1997), and *Chittister v. Department of Community and Economic Development*, 226 F.3d 223 (3d Cir.2000). Op. at 4-5.

States, 235 F.3d 1079, 1082-85 (8th Cir.2000) (en banc) (Bowman, J., dissenting), which required "a nexus between the purposes of the federal funding and the conditions placed on their receipt." Op. at 6.

We reserve consideration on the abrogation issue. But we disagree with the able District Court's conclusions on the Commonwealth's waiver of sovereign immunity. The Supreme Court has recognized § 504 of the Rehabilitation Act, following the 1986 amendment, to be an "unambiguous waiver of the State's Eleventh Amendment immunity." *Lane v. Pena*, 518 U.S. 187, 200 (1996). As noted, the 1986 amendment was enacted in response to the Supreme Court's decision in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), which held that "mere receipt of federal funds" was insufficient to constitute a waiver of sovereign immunity to Rehabilitation Act claims. *Id.* at 246. The *Atascadero State Hospital* Court stated that if a statute "manifest[s] a clear intent to condition participation in the programs funded under the Act on a State's waiver of its constitutional immunity," federal courts would have jurisdiction over claims against states accepting federal funds. *Id.* at 247.

It appears that Congress responded to the Supreme Court's direction. Section 2000d-7 of the Rehabilitation Act,[7] as amended, represents a "clear intention," as mandated by *Atascadero State Hospital*. Enacting the amendment to § 2000d-7, Congress put

---

[7]This appeal implicates several statutes. Section 2000d-7, as amended, provides states cannot be immune under the Eleventh Amendment from suits in federal court under § 504 of the Rehabilitation Act. Section 504 of the Rehabilitation Act, in turn, prohibits discrimination against persons with disabilities under "any program or activity receiving Federal financial assistance." Section 504 is codified at 29 U.S.C. § 704(a).

states on notice that by accepting federal funds under the Rehabilitation Act, they would waive their Eleventh Amendment immunity to Rehabilitation Act claims.[8] *Accord United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 605 (1986) ("Under ... Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision.").[9] In *Lane*, the Supreme Court recognized the "care with which Congress responded to our decision in Atascadero by crafting an unambiguous waiver of the States' Eleventh Amendment immunity." 518 U.S. at 200.

Six other courts of appeals have found under the plain language of the amended Rehabilitation Act statute that accepting federal funds results in a waiver of Eleventh Amendment immunity for the "program or agency" receiving the funds. *Nihiser*, 269 F.3d at 628-29;

---

[8]To reiterate, the 1986 amendment provides: "A state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 ...." 42 U.S.C. § 2000d-7(a)(1).

[9]While the 1986 amendment was under consideration, the Department of Justice stated to Congress, "To the extent that the proposed amendment is grounded on congressional spending powers, [it] makes it clear to states that their receipt of Federal funds constitutes a waiver of their [E]leventh [A]mendment immunity." 132 CONG. REC. 28,624(1986). When signing the bill, President Reagan explained the Rehabilitation Act "subjects states, as a condition of their receipt of federal financial assistance, to suits for violation of federal laws prohibiting discrimination on the basis of handicap, race, age, or sex to the same extent as any other public or private entities." 22 Weekly Comp. Pres. Doc. 1421 (Oct. 27, 1986), *reprinted in* 1986 U.S.C.C.A.N. 3554.

Jim C., 235 F.3d at 1081-82; *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir.2000); *Pederson v. La. St. Univ.*, 213 F.3d 858, 875-76 (5th Cir.2000); *Sandoval v. Hagan*, 197 F.3d 484, 493-94 (11th Cir.1999), *rev'd on other grounds*, 532 U.S. 275 (2001); *Litman v. George Mason Univ.*, 186 F.3d 544, 554 (4th Cir.1999); *Clark v. California*, 123 F.3d 1267, 1271 (9th Cir.1997). We agree with their conclusions.

Under the statutory definitions in the Rehabilitation Act, the state, as a whole, cannot be a "program or activity." As other courts have noted, if the entire state government were subject to § 504 whenever one of its components received federal funds, subsection (b)(1)(B) would be redundant. See Jim C., 235 F.3d at 1081 n. 3 (noting that under the flawed interpretation, "both the distributing and receiving state entities would already be covered under (b)(1)(A) whenever either receives federal funds"); *Lightbourn v. County of El Paso*, 118 F.3d 421, 427 (5th Cir.1997); *Schroeder v. City of Chicago*, 927 F.2d 957, 962 (7th Cir.1991). But state departments or agencies receiving federal funds, like the Pennsylvania Department of Corrections, qualify under the relevant statutory definition. 29 U.S.C. § 794(b)(1)(A).

Therefore, if a state accepts federal funds for a specific department or agency, it voluntarily waives sovereign immunity for Rehabilitation Act claims against the department or agency--but only against that department or agency. *See Coll. Sav. Bank*, 527 U.S. at 675 (describing these determinations as "stringent," in part because of the Eleventh Amendment's important federal purpose); see also *Jim C.*, 235 F.3d at 1081-82:

> To avoid the effect of Section 504 ... the State would be required to sacrifice federal funds only for that department. This requirement is comparable to the ordinary quid pro quo that the

> Supreme Court has repeatedly approved; the State is offered federal funds for some activities, but in return, it is required to meet certain federal requirements in carrying out those activities.

(citations omitted).[10]

In this sense, the scope of the Eleventh Amendment immunity waiver directly correlates to the state department or agency receiving federal financial assistance. The Commonwealth of Pennsylvania arguably could limit its waiver by foregoing certain federal funds. The Court of Appeals for the Eighth Circuit explained:

> A State and its instrumentalities can avoid Section 504's waiver requirement on a piecemeal basis, by simply accepting federal funds for some departments and declining them for others. The State is accordingly not required to renounce all federal funding to shield chosen state agencies

---

[10]In two recent cases, the courts held that a state is not protected by sovereign immunity against a suit against state officials by a person claiming benefits promised under the federal Medicaid law. See *Westside Mothers v. Haveman*, 289 F.3d 852, 857 (6th Cir.2002) ("If a state does choose to participate [in the Medicaid program], Congress may then condition receipt of federal moneys upon compliance with federal and statutory directives .... A state can decline to participate in Medicaid.") (quotations and citations omitted); *Antrican v. Odom*, 290 F.3d 178, 190 (4th Cir.2002) ("North Carolina elected to participate in the federal Medicaid program and, therefore, to be bound by the requirements of the Medicaid Act. In doing so, the State agreed to the conditions of participation, including the possibility that if it failed to conform to the program as established by federal law, it faced the risk of being ordered by a federal court to correct the problems in its system. If the State did not want to face this federal involvement, it was free to decline federal funds ... or to decline to operate such a program at all.").

from compliance with Section 504.

Jim C., 235 F.3d at 1081. But the Rehabilitation Act's definition of "program or activity" sweeps"all the operations" of a department or agency receiving federal financial assistance under the Act's coverage. 29 U.S.C. § 794(b). Although a particular "activity" (e.g., SCAAP)--or the conduct of that "activity" (e .g., funding inmate educational programs)--might be the state's only link to federal funds, the waiver under § 2000d-7 is structural. It applies to "all the operations" of the department or agency receiving federal funds (i.e., the Pennsylvania Department of Corrections).

A state's waiver of sovereign immunity is not lightly granted. The Supreme Court has cautioned: "In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' " *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)). Mere participation in a federal program is not sufficient to waive immunity. Id. at 673. But where a state participates in a federal financial assistance program "in light of the existing state of the law," the state is charged with awareness that accepting federal funds can result in the waiver of Eleventh Amendment immunity. Id. at 687. In *Lane*, the Supreme Court said § 2000d-7 represents "the most express language" of waiver of Eleventh Amendment immunity. 518 U.S. at 200. The Commonwealth of Pennsylvania could reasonably expect that providing federal funds to the Department of Corrections could lead to the waiver of Eleventh Amendment immunity against Rehabilitation Act claims. *Accord Stanley*, 213 F.3d at 344 ("[T]he ADA and the Rehabilitation Act are identical for purposes of §

5. But the Rehabilitation Act also is a condition on the receipt of federal funds .... [T]he Rehabilitation Act is enforceable in federal court against recipients of federal largess.").

As noted, the District Court relied on the dissenting opinion from *Jim C.* in rejecting Koslow's claim. The en banc Court of Appeals for the Eighth Circuit in *Jim C.* rejected this analysis, holding, "Congress may require a waiver of state sovereign immunity as a condition for receiving federal funds, even though Congress could not order the waiver directly." 235 F.3d at 1081. We agree.[11]

The Commonwealth of Pennsylvania accepted federal financial assistance under SCAAP, and provided these federal funds to the Department of Corrections. Therefore, the Commonwealth of Pennsylvania waived immunity for § 504 claims against its Department of Corrections under the Rehabilitation Act. Like the majority of courts that have considered the issue, we hold the Commonwealth's acceptance of Rehabilitation Act funds falls under the second recognized exception to Eleventh Amendment immunity.[12]

---

[11]The District Court and the dissenting judge in *Jim C.* also focused on the possible "coercion" engendered by the federal funding of particular state programs or activities. Those arguments are considered in the subsequent section on "unconstitutional conditions." The District Court's adoption of a "nexus" requirement under *South Carolina v. Dole*, 483 U.S. 203 (1987), is treated in the section relating to the Spending Clause.

[12]In *Garcia v. S.U.N.Y. Health Sciences Ctr. of Brooklyn*, 280 F.3d 98 (2d Cir.2001), the Court of Appeals for the Second Circuit held that § 504 of the Rehabilitation Act "constitutes a clear expression of Congress's intent to condition acceptance

B.

The Commonwealth defendants also urge affirmance on two related grounds. First, they contend the provisions placed on their receipt of Rehabilitation Act funds constitute "unconstitutional conditions," requiring a "surrender" of constitutionally protected rights. *Cf. Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583, 593-94 (1926) ("[T]he state ... may not impose conditions which require the relinquishment of constitutional rights.... It is inconceivable that the guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."). Because the federal government is not required to provide states with funds does not mean it may condition distributions on arguably unconstitutional grounds. *E.g., Speiser v. Randall*, 357 U.S. 513, 526 (1958) (the government may not act indirectly "to produce a result which [it] could not command directly"). We exercise plenary review.

The "constitutionally protected right" the

---

of federal funds on a state's waiver of its Eleventh Amendment immunity." *Id.* at 113. But the court found the waiver was ineffective because in 1995, the last date of discrimination, the state agency did not "know" Title II was effective and would therefore believe Title II's abrogation for Title II claims made § 504's waiver redundant. Id. at 114. This argument was not briefed or argued before the District Court. We note, however, that the ADA was not enacted to alter existing causes of action. See 42 U.S.C. § 12201(b) (retaining existing causes of action). Therefore, the "clear intent to condition participation in the programs funded," required by *Atascadero*, 473 U.S. at 247, ensured the Commonwealth of Pennsylvania knew that by accepting certain funds under the Rehabilitation Act for certain departments or agencies, it waived immunity from suit on Rehabilitation Act claims for those entities.

Commonwealth defendants contend they must "sacrifice" upon accepting federal funds is their Eleventh Amendment immunity from suits under the Rehabilitation Act. The Commonwealth defendants draw analogies to select seminal — and dated — "unconstitutional conditions" cases,[13] when the Supreme Court struck down states' attempts to force certain litigants to waive immunity from suit in state court. *Cf. Barron v. Burnside*, 121 U.S. 186, 199 (1887) ("As the Iowa statute makes the right to a permit dependent on the surrender by the foreign corporation of a privilege secured to it by the constitution and laws of the United States, the statute requiring the permit must be held to be void."); *Home Ins. Co. v. Morse*, 87 U .S. 445, 458 (1874) ("The Constitution of the United States secures to citizens of another State than that in which suit is brought an absolute right to remove their cases into the Federal court upon compliance with the terms of the act of 1789. The statute of Wisconsin is an obstruction to this right, is repugnant to the Constitution of the United States and the laws in pursuance thereof, and is illegal and void.").

More recently, the Supreme Court held Congress may condition the receipt of federal funds on a state's relinquishment of certain immunities. *E.g., Alden*, 527 U.S. at 755 ("the Federal Government [does not] lack the authority or means to seek the States' voluntary consent to private suits"); *Coll. Sav. Bank*, 527 U.S. at 686 (allowing Congress to condition the exercise of an Article I power on a state's agreement to relinquish Eleventh Amendment immunity). The Eleventh Amendment issue the Commonwealth defendants now raise was not

---

[13]Of course, the "unconstitutional conditions" doctrine boasts a long history reaching into more contemporary decisions.

precisely before the Supreme Court in *Alden* or *College Savings Bank*.[14] Nonetheless, we believe conditioning federal funds on the waiver of sovereign immunity under the Eleventh Amendment is not unconstitutional per se. The "unconstitutional conditions" doctrine is based on the proposition that government incentives may be inherently coercive. *See Frost & Frost Trucking Co.*, 271 U.S. at 593 ("In reality, the carrier is given no choice, except a choice between the rock and the whirlpool--an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden."). But the Supreme Court has not yet applied the "unconstitutional conditions" doctrine to cases between two sovereigns. Unlike private persons, states have the resources to serve their citizens even if the federal government, through economic incentives, encourages a particular result. *Cf. New York v. United States*, 505 U.S. 144, 171-72 (1992) ("Where the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds by Congress may influence a State's legislative choices."); *Dole*, 483 U.S. at 210-11 (Congress could influence states' authority over the legal drinking age because "[w]ere South Dakota to succumb to the blandishments

---

[14] *Alden*, which principally addressed Congress's Article I powers of abrogation, did not involve the receipt of federal funds under the Rehabilitation Act, but a state's immunity from suit in its own courts. Nevertheless, the *Alden* Court reiterated, "[W]e have not questioned the general proposition that a State may waive its sovereign immunity and consent to suit." 537 U.S. at 737 (citing *Seminole Tribe*, 517 U.S. at 65)). *College Savings Bank*, in which the Supreme Court rejected petitioner's argument that a state had "impliedly" or "constructively" waived its immunity from Lanham Act suits in federal court, 527 U.S. at 676-77, recognized that an "unequivocal" waiver of a state's sovereign immunity was constitutionally possible. *Id.* at 680-81.

offered by Congress and raise its drinking age to 21, the State's action in so doing would not violate the constitutional rights of anyone"). A state's political powers — not the least of which is the power to levy taxes on its citizens — help ensure the federal government does not "coerce" the state through economic "encouragement." An individual citizen, in contrast, lacks these formidable institutional resources.

As noted, the Commonwealth could avoid § 504 claims against the Department of Corrections by declining all federal funds to the Department of Corrections. Though this "sacrifice" would doubtless result in some fiscal hardship--and possibly political consequences--it is a free and deliberate choice by the Commonwealth that does not rise to the level of an "unconstitutional condition." The Commonwealth remains free to make the choice: it may decline federal aid to the Department of Corrections, but having accepted the federal funds, it is bound by conditions of the Rehabilitation Act. By accepting SCAAP funds, the Commonwealth opens the Department of Corrections to suits under the Rehabilitation Act. For these reasons, we reject the contention that the receipt of federal funds constitutes "surrender" of Eleventh Amendment immunity and is therefore an "unconstitutional condition." [15]

---

[15]The parties dispute the authority of *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), where the Supreme Court upheld Congress's acquiescence to a bi-state compact between Tennessee and Missouri based on the states' agreement to confer federal jurisdiction on claims against the compact. *Id.* at 277, 281-82. If Congress can never require a state to waive Eleventh Amendment immunity in exchange for a federal benefit, *Petty* would have been decided differently. The Commonwealth defendants seek to distinguish Petty, claiming it involved three "sovereigns" and is inapposite. But if Congress

C.

The Commonwealth defendants also maintain the conditions placed on the receipt of Rehabilitation Act funds are so "unrelated" to the "purpose" of the federal funds as to violate the Spending Clause. U.S. CONST. art. I, § 8, cl. 1. Specifically, the Commonwealth defendants suggest the federal government's interest in particular programs or projects of the Department of Corrections is too attenuated from the "general" waiver of immunity respecting Rehabilitation Act claims. We exercise plenary review over this question of law.

Federal statutes are presumed constitutional. *Reno v. Condon*, 528 U.S. 141, 147 (2000); *Union Pac. R.R. Co. v. United States*, 99 U.S. (9 Otto) 700, 718 (1878). Nevertheless, Congress's spending power is subject to

---

can constitutionally condition a two-state gratuity for a joint agency, as the Supreme Court said it could in *Petty*, it surely can do so for one state and one of its agencies.

It is clear that Congress's decision to disburse federal funds may be coupled with preconditions of acceptance. In *MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491 (2001), we said, "[B]oth the grant of consent to form an interstate compact and the disbursement of federal monies are congressionally bestowed gifts or gratuities, which Congress is under no obligation to make, which a state is not otherwise entitled to receive, and to which Congress can attach whatever conditions it chooses." *Id.* at 505. We also noted that in Commerce Clause cases, "the authority to regulate local telecommunications is a gratuity to which Congress may attach conditions, including a waiver of immunity to suit in federal court. Thus, the submission to suit in federal court ... is valid as a waiver, conditioned on the acceptance of a gratuity or gift, as permitted by College Savings." *Id.* at 509. On balance, we believe *Petty* and *MCI Telecommunications* support our conclusion.

certain restrictions. *United States v. Butler*, 297 U.S. 1, 78 (1936). Spending Clause legislation must: (1) pursue the general welfare; (2) impose unambiguous conditions on states, so they can exercise choices knowingly and with awareness of the consequences; (3) impose conditions related to federal interests in the program; and (4) not induce unconstitutional action. *Dole*, 483 U .S. at 207-08, 210.

The District Court found no "connection between" Rehabilitation Act funds received by the Department of Corrections and Koslow's discrimination claim.[16] On appeal, the Commonwealth defendants contend an Eleventh Amendment waiver must be specifically "tailored" to a particular federal interest. Because Koslow has purportedly failed to demonstrate a federal interest in SCAAP funds received by the Pennsylvania Department of Corrections, the Commonwealth defendants contend § 504 is demonstrably unconstitutional under the Spending Clause. *Cf. Jim C.*, 235 F.3d at 1084 (Bowman, J., dissenting) (quotation and citation omitted).

We disagree. The Supreme Court in *Dole* declined to "define the outer parameters of the 'germaneness' or 'relatedness' limitation on the imposition of conditions under the spending power." 483 U.S. at 208 n. 3. Therefore, one need only identify a discernible relationship imposed by a Rehabilitation Act condition on a "department or agency" and a federal interest in a program it funds. Through the Rehabilitation Act, Congress has expressed a clear interest in eliminating disability-based discrimination in state departments or agencies. *Alexander v. Choate*, 469 U.S. 287, 295-97 (1985). That interest, which is undeniably significant and

---

[16]The District Court did not explicitly engage in the *Dole* analysis.

clearly reflected in the legislative history, flows with every dollar spent by a department or agency receiving federal funds. The waiver of the Commonwealth's immunity from Rehabilitation Act claims by Department of Corrections employees furthers that interest directly.

Moreover, § 504 governs only a "program or activity" receiving federal funds. To put it another way, the waiver of immunity conditioned on receipt of Rehabilitation Act funds applies on an agency-by-agency, or a department-by- department, basis. 29 U.S.C. § 794(b).[17] This limitation helps ensure the waiver accords with the "relatedness" requirement articulated in Dole. The Commonwealth defendants accepted funds under SCAAP. Rehabilitation Act funds received by specific departments or agencies are not tracked. For our purposes, all funds received by the Department of Corrections under the Rehabilitation Act are fungible. It is virtually impossible to determine whether federal dollars paid for Koslow's salary or any benefits he received. *Cf. Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186, 195 (3d Cir.1990) ("Legally as well as economically, money is fungible.").

Both Title VI and Title IX, which have been upheld as valid Spending Clause legislation, prohibit race and sex discrimination by "programs" receiving federal funds. *E.g., Grove City Coll. v. Bell*, 465 U.S. 555, 571 n. 21 (1984) (finding employees who work in an education program receiving federal assistance are protected under Title IX "even if their salaries are not funded by federal money" (quotations and citations omitted)); *Lau v.*

---

[17]The legislative history accompanying the bill indicates, by way of example: "If federal health assistance is extended to a part of a state health department, the entire health department would be covered in all of its operations." S.Rep. No. 64, 100th Cong., 2d Sess. 16 (1987).

Nichols, 414 U.S. 563, 569 (1974) ("The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. Whatever may be the limits of that power, they have not been reached here.") (citations omitted) (Title VI).[18] Similarly, the conditions imposed on the Commonwealth defendants for accepting funds under SCAAP do not abridge the Spending Clause.

For these reasons, Koslow's Rehabilitation Act claim against the Pennsylvania Department of Corrections is not constitutionally barred.

V.

We now turn to Koslow's claims under the ADA for prospective relief against SCI-Graterford Superintendent Vaughn.[19] The District Court found Koslow could not bring these claims against Vaughn in either his individual or his official capacity because the ADA does not contemplate such "individual, or supervisor, liability ." Op. at 3. Before reaching this conclusion, however, the District Court cited a footnote from *Garrett*, in which the Supreme Court said:

Our holding here that Congress did not validly

---

[18]See also *Barnes v. Gorman*, ___ U.S. ___, 122 S.Ct. 2097, 2100 (2002) ("Thus, the remedies for violations of § 202 of the ADA and § 504 of the Rehabilitation Act are coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964 ....").

[19]As noted, after *Garrett* (which barred claims under Title I of the ADA against states) and the District Court's dismissal of Koslow's Title II claims (which is not appealed), this claim for prospective injunctive relief against Vaughn is Koslow's only remaining ADA claim.

> abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*, 203 U.S. 123 (1908).[20]

536 U.S. at 374 n. 9. The District Court then concluded, "More significant is the fact that even were I to read the Second Amended Complaint to plead an ADA claim explicitly against Superintendent Vaughn, there is no individual, or supervisor, liability under the ADA." Op. at 3. We will first consider the statutory issue before turning to the constitutional argument. We exercise plenary review over both.

A.

Title I of the ADA, incorporating the enforcement scheme of the Civil Rights Act of 1964, authorizes private injunctive suits against a "respondent," defined by statute to include an "employer." 42 U.S.C. SS 2000e(n), 2000e-5(f)-(g). The District Court's analysis focused on whether there is "individual" or "supervisor" liability under the statute. But both Title I and Title VII define "employer" to include persons "engaged in an industry affecting commerce who has 15 or more employees ... and

---

[20]In *Ex parte Young*, the Supreme Court found a state official acting in violation of the Constitution or federal law acts ultra vires and is no longer entitled to the state's immunity from suit. The "*Young* fiction" allows courts to avoid entering judgments directly against the state while permitting individual actions against officials violating federal law.

any agent of such person." 42 U.S.C. SS 2000e(b), 12111(5)(A). State governments can constitute "employers" under the statute.[21] As the Supreme Court held in *Garrett*:

> [Title I of] [t]he ADA prohibits certain employers, including the States, from 'discriminat[ing] against a qualified individual with a disability because of the disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms conditions, and privileges of employment.

531 U.S. at 360-61 (citations omitted). And for the same reasons that we have allowed Title VII claims to proceed against public officials in their official capacities, an official sued in his official capacity is an "agent" of the

---

[21]42 U.S.C. § 2000e(b) provides:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

Although the United States is excluded by this definition, state governments are not.

state employer under Title I of the ADA. *Cf. In re Montgomery County*, 215 F.3d 367, 372-75 (3d Cir.2000) (allowing officials in their official capacities to be held liable under Title VII).

While there appears to be no individual liability for damages under Title I of the ADA, *cf. EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1280 n. 4 (7th Cir.1995), prospective relief against state officials acting in their official capacities may proceed under the statute. The complaint alleges misconduct by Vaughn only as an official supervisor at SCI-Graterford. Therefore, under the statute, insofar as Koslow seeks prospective injunctive relief, he states a cognizable claim against SCI-Graterford Superintendent Vaughn, but only in his representative — not his individual — capacity.

B.

The parties also dispute whether Koslow's ADA prospective claim for injunctive relief against SCI-Graterford Superintendent Vaughn is barred by the Eleventh Amendment. *Cf. Seminole Tribe*, 517 U.S. at 73. Said another way, the parties disagree whether the *Ex parte Young* doctrine applies in the first instance. As noted, the Eleventh Amendment bars private suits against a state sued in its own name except in certain narrow circumstances. *Alden*, 527 U.S. at 755-56. But the Supreme Court has said, "Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985).

The Commonwealth defendants contend the

Eleventh Amendment only permits suits against officials in their individual capacities, barring suits against officials in their representative capacities absent waiver or abrogation. We disagree. The Eleventh Amendment has not been interpreted to bar a plaintiff's ability to seek prospective relief against state officials for violations of federal law. Official-capacity suits are an alternative way to plead actions against entities for which an officer is an agent. *See Kentucky v. Graham*, 473 U.S. 159, 167 n. 14 (1985):

> Unless a State has waived its Eleventh Amendment immunity or Congress has overridden it, however, a State cannot be sued directly in its own name regardless of the relief sought. Thus, implementation of state policy or custom may be reached in federal court only because official-capacity actions for prospective relief are not treated as actions against the State.

(citations omitted); *see also Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, ___ U.S. ___, 122 S.Ct. 1753, 1760 (2002) ("In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.") (quotations and citations omitted); *Seminole Tribe*, 517 U.S. at 73 (Eleventh Amendment no bar to "federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to end a continuing violation of federal law") (quotation and citation omitted).

Three other courts of appeals have allowed suits for purely injunctive relief under the ADA against state officials. See *Carten v. Kent St. Univ.*, 282 F.3d 391, 396 (6th Cir.2002) ("[A]n official who violates Title II of the

ADA does not represent 'the state' for purposes of the Eleventh Amendment, yet he or she nevertheless may be held responsible in an official capacity for violating Title II [of the ADA], which by its terms applies only to 'public entit[ies].' "); *Gibson v. Ark. Dept. of Corr.*, 265 F.3d 718, 720 (8th Cir.2001) ("The Eleventh Amendment is not a bar to federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to end a continuing violation of federal law.") (quotations and citations omitted); *Roe No. 2 v. Ogden*, 253 F.3d 1225, 1233-34 (10th Cir.2001). In a different context, we have said, "The principle which emerges from *Young* and its progeny is that a state official sued in his official capacity for prospective injunctive relief is a person within section 1983, and the Eleventh Amendment does not bar such a suit." *Hindes v. FDIC*, 137 F.3d 148, 165 (3d Cir.1998).

For these reasons, federal ADA claims for prospective injunctive relief against state officials are authorized by the *Ex parte Young* doctrine. The Court of Appeals for the Eighth Circuit's analysis in *Gibson* is apposite. In that case, the court found *Seminole Tribe*, on which the Commonwealth defendants rely, dealt with a "markedly different" statute than the ADA, the Indian Gaming Regulatory Act (IGRA). 265 F.3d at 720.[22] Unlike

---

[22]In *Seminole Tribe*, an Indian tribe sued the governor of Florida under the IGRA. The Supreme Court held *Ex parte Young* did not apply to the tribe's suit against the governor because Congress did not intend to authorize federal jurisdiction under *Ex parte Young* to enforce the IGRA. *Seminole Tribe*, 517 U.S. at 75 n. 17, 76. The IGRA allows tribes to sue states in federal district court if a state does not negotiate regarding certain gaming rights, but remedial authority is minimal. The Supreme Court dismissed the tribe's IGRA claim, holding, "[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily

the IGRA, the court found there were several enforcement mechanisms for plaintiffs to sue under Titles I or II of the ADA. *Id.* at 721 (noting all remedies of Title VII of the Civil Rights Act of 1964, including equitable orders and contempt proceedings, are applicable to ADA Title I plaintiffs). Second, unlike the IGRA, Congress "chose to use existing civil rights enforcement mechanisms" when drafting the ADA. *Id.* In doing so, Congress was aware that federal district courts had issued orders "compelling state officials to perform their statutory obligations." *Id.* at 722. Third, the court noted, a single state official can enforce an ADA provision, while complying with the IGRA requires cooperative efforts by state negotiators and ratification by the state legislature. *Id.* Considering all of these factors, the court held, "the ADA is a more suitable candidate than IGRA for *Ex parte Young* suits designed to change the behavior of specific government officials." *Id.*

When the relief sought is prospective injunctive relief, the request "is ordinarily sufficient to invoke the *Young* fiction." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 281 (1997). Koslow's claim for reinstatement, with accommodations for his disability, is the type of injunctive, "forward-looking" relief cognizable under *Ex parte Young*. Therefore, he can state federal claims under the ADA against Superintendent Vaughn, acting in his official capacity, for prospective injunctive relief.

VI.

Next, we consider whether the District Court

---

created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." Id. at 74. The Court said allowing actions against an official under *Ex parte Young* would expand remedial powers beyond what Congress intended. *Id.* at 75.

properly granted summary judgment to PHICO and CompServices on Koslow's claims under the ADA and the Rehabilitation Act. The District Court found these workers' compensation providers had no decisionmaking authority over Koslow's employment:

> They did not fire plaintiff or refuse him an accommodation. PHICO ceased to be involved in any way after December 1997, and it is not at all clear that plaintiff is complaining about anything that occurred during PHICO's tenure. The only act attributable to CompServices is its referral of plaintiff to an independent medical examination .... [I]t is ludicrous to suppose that by furnishing to the Commonwealth defendants the information that plaintiff was fit to return to work, CompServices was discriminating against him ....

Op. at 7. We review the grant of summary judgment de novo. *Doe*, 242 F.3d at 446.[23]

A.

From 1990 to 1997, under agreements with the Commonwealth of Pennsylvania, PHICO was the third-party administrator for some portions of the Commonwealth's self-insured workers' compensation plans. PHICO maintains that these services were primarily ministerial, such as forwarding information received from health care providers to the Department of Corrections, calculating sums correctional facilities owed in benefits, and the like. For these services, PHICO was

---

[23]The District Court found CompServices and PHICO, agents of their employer, could be liable even when the principal was immune from liability. Therefore, the Court found CompServices and PHICO could be covered entities under the ADA.

paid a flat rate.

PHICO's Vice President of Claims Operations testified the company's compensation contracts applied only to PHICO employees, not to Commonwealth employees. Koslow contends a jury was entitled to test the credibility of this statement, rendering summary judgment inappropriate. Moreover, Koslow suggests genuine issues of material fact remain whether PHICO's "nonfeasance" on his claim contributed to a "breakdown in the interactive process" between Koslow and SCI-Graterford, which itself might constitute a violation of the ADA.

We disagree. The District Court correctly concluded PHICO had no responsibility for ensuring SCI-Graterford's compliance with the ADA and the Rehabilitation Act. Only SCI-Graterford administrators, not PHICO administrators, could determine whether Koslow, if "disabled," could be accommodated. No material issues of fact remain unresolved on PHICO's "decisionmaking" authority over Koslow.

Additionally, although the District Court did not address this issue directly, we do not believe that under these facts, PHICO is a "covered entity" under the ADA. Only "covered entities," as defined in 42 U.S.C. § 12112(a), may be liable under the statute. Here, PHICO could be a proper defendant only as the "agent" of Koslow's employer. Id. § 12112(2). But in *Krouse v. American Sterilizer Co.*, 126 F.3d 494 (3d Cir.1997), we rejected an agency theory similar to Koslow's, holding that in the absence of evidence that a third-party workers' compensation administrator had harassed plaintiff at the direction of plaintiff's employer, the administrator was "not an agent" of the employer and therefore was "not a covered entity under the ADA." *Id.* at 505. As in *Krouse*, Koslow cannot demonstrate PHICO

acted at the direction of the Pennsylvania Department of Corrections in "wrongly" denying his claim.

B.

On December 29, 1997, CompServices began providing third-party workers' compensation administration services for claims against SCI-Graterford accruing prior to July 1997. Koslow contends CompServices, like PHICO, had contractual and statutory duties--albeit "implicit" ones--not to discriminate against SCI- Graterford employees. Similar to his previous argument, Koslow contends there is an issue of fact whether CompServices's obligations to comply with Title II of the ADA extended to the employees of SCI-Graterford.

We disagree. CompServices, which assumed responsibilities for the SCI- Graterford account in December 1997, had, at most, only a minimal connection with Koslow's claim. Like PHICO, CompServices had no decisionmaking authority over Koslow and had no role in the alleged discrimination. For the reasons noted, CompServices is not a "covered entity" for ADA purposes.

The District Court correctly disposed of Koslow's ADA claims against PHICO and CompServices.

VII.

Finally, we consider the dismissal of Koslow's state law claims against PHICO and CompServices. The District Court concluded these PHRA claims were not cognizable because the statute does not define "employer" to include an "agent" thereof:

> The PHRA applies to "any employer[,]" but unlike the ADA does not contain a reference to an "agent"

> thereof. Since the PHRA does not define "employer," courts look to the common law indicia of a master-servant relationship .... The employer's power to control the nature and parameters of the employee's activities is the key to the relationship.... I reject out of hand plaintiff's contention that the Supremacy Clause requires the term "employer" as it is used in the PHRA not to be interpreted any more narrowly than it is defined in the ADA or Title VII.

We exercise plenary review over this question of law.

The PHRA defines "person" as "includ[ing] one or more individuals, partnerships, associations, organizations, corporations ... [and] ... any ... agent... thereof." 43 P.S. § 954(a). Koslow contends the PHRA defines "person" to include an "agent," so PHICO and CompServices, as "alleged agents" of the Department of Corrections, can be liable. We disagree. No Pennsylvania authority supports Koslow's interpretation of the PHRA. In *Dici v. Pennsylvania*, 91 F.3d 542, 552 (3d Cir.1996), we said, "The employment discrimination provision of the PHRA declares only that 'any employer' may be liable." We have never said "any person" can be liable under the statute. *See also Van Horn v. Elbeco Inc.*, No. 94-2720, 1996 WL 385630, at *4 n. 18 (E.D.Pa. July 10, 1996) ("[T]he PHRA has no ... reference to agents of [an] employer in its definition of 'employer.' "). Additionally, under the PHRA, the "person" must "employ four or more persons," arguably expressing the intent that only employers be held liable. The District Court properly disposed of Koslow's state law claims.

VIII.

For these reasons we will reverse in part and affirm in part. We will reverse the judgment of the District Court

holding the Commonwealth had not waived sovereign immunity to Rehabilitation Act claims. We also will reverse the judgment of the District Court denying Koslow's ADA claim for prospective injunctive relief against SCI-Graterford Superintendent Vaughn, acting in his official capacity. In all other respects, we will affirm the judgment of the District Court. We will remand for further proceedings consistent with this opinion.

United States District Court,
E.D. Pennsylvania.

George KOSLOW
v.
COMMONWEALTH OF PENNSYLVANIA, et al.

No. CIV. A. 97-5951.

May 31, 2001.

MEMORANDUM AND ORDER

FULLAM, Senior District Judge.

This action arises under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, the Pennsylvania Human Relations Act (PHRA), 42 Pa. Cons.Stat. Ann. § 951 *et seq.*, and the Rehabilitation Act, 29 U.S.C. § 701 *et seq.* The plaintiff is George Koslow, formerly employed as a water treatment plant supervisor at the State Correctional Institution at Graterford. He was injured on the job and claims that defendants refused to accommodate his disability. Defendants are the Commonwealth of Pennsylvania and SCI Graterford Superintendent Donald T. Vaughn (collectively, "the Commonwealth defendants"), PHICO Services Company (Graterford's former worker's compensation administrator) and CompServices, Inc. (the current administrator). Proceedings in this case were stayed pending the decision of the United States Supreme Court in *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). In *Garrett,* the Court held that Congress had not validly abrogated states' 11th Amendment immunity in passing Title I of the ADA. By Order dated March 8th, I asked the parties to brief the 11th Amendment issue. All defendants seek summary judgment on the basis of

sovereign immunity; in addition, PHICO and CompServices have moved for summary judgment on the grounds that they had no decision-making role with regard to plaintiff, nor were they involved in any allegedly discriminatory acts. For the reasons that follow, I conclude that summary judgment in favor of the defendants is appropriate.

ADA claims against the Commonwealth. Plaintiff makes much of the fact that he is pursuing a claim under Title II of the ADA, as well as Title I. Title II, which applies only to "public entities," deals with public accommodations and services; Title I deals with employment. Although the circuits are divided on this issue--and both the Supreme Court in *Garrett* and the United States Court of Appeals for the Third Circuit in *Lavia v. Commonwealth of Pennsylvania*, 224 F.3d 190, 194 n. 2 (3d Cir.2000), have avoided it--I am convinced that Congress intended Title I to be the sole avenue for pursuing employment discrimination claims based on disability. Title I expressly deals with employment discrimination, while Title II deals with "services, programs, or activities of a public entity," 42 U.S.C. § 12132, and "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *See Garrett*, 531 U.S. at --- n.1, 121 S.Ct. at 960 n. 1 (*quoting Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983)). Moreover, I conclude that the reasoning of the Third Circuit in *Lavia* and the Supreme Court in *Garrett* apply with equal force to Title II, and that Congress did not validly abrogate states' immunity when it passed this legislation. *See Moyer v. Conti*, C.A. No. 99-744, 2000 WL 1478791 (E.D.Pa. Oct. 5, 2000), *appeal docketed*, No. 00-2886 (3d Cir. Oct. 3, 2000).

The question remains whether plaintiff may still have a viable ADA claim against the Commonwealth via an action against the individual defendant, Superintendent Vaughn, pursuant to *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). In a footnote to its opinion in *Garrett*, the Supreme Court stated:

> Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*. In addition, state laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress.

Garrett, 531 U.S. at --- n.9, 121 S.Ct. at 968 n. 9 (citation omitted). Since plaintiff also seeks prospective injunctive relief--reinstatement--he believes that he can maintain an *Ex parte Young* action against defendant Vaughn. The Commonwealth, anticipating this argument, asserts that the footnote is *dicta*. More significant is the fact that even were I to read the Second Amended Complaint to plead an ADA claim explicitly against Superintendent Vaughn, there is no individual, or supervisor, liability under the ADA. *See Lantz v. Hospital of the Univ. of Pa.*, C.A. No. 96-2671, 1996 WL 442795, at *6 (E.D.Pa. July 30, 1996).

PHRA claims against the Commonwealth. It is well-settled that a *federal* court has no jurisdiction over PHRA claims against the Commonwealth. Plaintiff urges that I take supplemental jurisdiction over his PHRA

claims; I cannot. *See Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 120-21, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984)("[N]either pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment.").

Plaintiff's claims against the Commonwealth pursuant to § 504 of the Rehabilitation Act. Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), prohibits discrimination on the basis of disability in programs receiving federal funding. In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985), the Supreme Court held that Congress had not validly abrogated the states' 11th Amendment immunity when it enacted § 504. Congress thereafter attempted to override *Atascadero* by passing the following:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, and Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provision of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. § 2000d-7(a)(1). Congress therefore has satisfied the first requirement of the test for a valid abrogation of states' immunity: it has unequivocally expressed its intent to do so. The second part of the test, however, is "congruence and proportionality"--that is, whether Congress has identified a "pattern of discrimination by the States which violates the Fourteenth Amendment, and [whether] the remedy imposed by Congress ... is congruent and proportional to the targeted violation." *Garrett*, 531 U.S. at ----, 121 S.Ct.

at 967-68. No specific unconstitutional conduct by the states was identified by Congress, and therefore § 504 must fall victim to the same fate that has lately befallen other antidiscrimination statutes insofar as they are applied to the states. *Cf. Garrett, supra* (ADA); *Chittister v. Department of Cmty. & Econ. Dev.*, 226 F.3d 223 (3d Cir.2000)(FMLA); *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997)(RFRA); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000)(ADEA), etc.

The only way that plaintiff can assert a claim under § 504, then, is if the Commonwealth of Pennsylvania has waived its sovereign immunity. It clearly has not done so explicitly, as there is no legislation that can be so construed. In order for Pennsylvania to have implicitly waived its immunity by accepting federal funds, the conditions on the grant of money must be unambiguously expressed by Congress. *See Pennhurst*, 451 U.S. at 17, 101 S.Ct. 1531. Congress must also be specific; a "general authorization" does not suffice. *See Atascadero*, 473 U.S. at 246, 105 S.Ct. 3142. In *Atascadero*, the Court held that § 504 fell "far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Id.* at 247, 105 S.Ct. 3142. The Commonwealth asserts that the passage of 42 U.S.C. § 2000d-7(a) did not change anything, as it is nothing if not a "general authorization."

One of the few cases dealing with § 504 that focuses on Spending Clause- related waiver (rather than Congressional abrogation) of 11th Amendment immunity is *Jim C. v. United States*, 235 F.3d 1079 (8th Cir.2000)(*en banc*), *cert. petition filed*, --- U.S. ----, 121 S.Ct. 2591, 150 L.Ed.2d 750, 69 U.S.L.W. 3646 (Mar. 22, 2001). In *Jim C.*, the parents of an autistic child sued the Arkansas

Department of Education, alleging that defendant had failed to comply with the requirements of § 504. The Court of Appeals for the Eighth Circuit held that § 504 was a valid exercise of Congress' spending power, and that the conditions placed on a state's receipt of federal funds were not unduly coercive:

> ... Congress may require a waiver of state sovereign immunity as a condition for receiving federal funds, even though Congress could not order the waiver directly. While it appears, as the defendant urges, that the "financial inducements" employed by Congress can become so "coercive as to the cross the point where 'pressure turns into compulsion,' " that limit has not been crossed here.

Jim C., 235 F.3d at 1081 (citations omitted). The court also held that a state only waives its sovereign immunity with regard to those departments or agencies that receive federal funds, and therefore that it "can avoid Section 504's waiver requirement on a piecemeal basis." *See id.*

The dissent makes two salient points: first, on the question of coercion, it notes that the federal funding received by the Arkansas Department of Education is so substantial--$250,000,000--that it "could not easily be replaced," leading to the "conclusion that pressure has turned into compulsion and that the waiver given by the State is therefore unenforceable." *Id.* at 1083. Second, the dissent questions

> whether Congress, in the guise of Spending Clause legislation, can achieve indirectly what it cannot constitutionally achieve directly. That is, can Congress get its way by presenting the states with the Hobson's choice of either waiving their Eleventh Amendment immunity from § 504 claims

> or foregoing all federal funds to support various traditional state activities such as education, highways, and the like?

Id. The dissent goes on to conclude that "the proper way to limit the Spending Clause (besides applying the coercion test) is to require, among other things, that any conditions placed on federal grants to the states be related 'to the federal interest in particular national projects or programs.' " *Id.* at 1084 (*quoting South Dakota v. Dole,* 483 U.S. 203, 207, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987)), and that there was no discernible relationship between Arkansas' receipt of grant money for education and the purposes of the Rehabilitation Act. In other words, the *Jim C.* dissent would require a nexus between the purposes of the federal funding and the conditions placed on their receipt. I agree that this is the more reasoned approach. As plaintiff does not argue that there is any connection between federal funds received by the state and his Rehabilitation Act claim, I hold that the Commonwealth of Pennsylvania has not waived its sovereign immunity in this case.

Plaintiff's claims against PHICO and CompServices. CompServices and PHICO reiterate the earlier assertion, raised in PHICO's second motion to dismiss, that because they are merely agents of the state, which enjoys 11th Amendment immunity, they are likewise immune. Their arguments are based on the traditional concept of agency law that if the principal has no liability, neither does his agent. However, as I noted in an earlier opinion in this case, the ADA defines "employer" to include an "any agent" of the employer. As written, the statute confers upon private entities independent "employer" status, and therefore they can be liable even if the state is immune, if plaintiff shows that they "participated in the decision-making process that forms the basis of the discrimination." *Lantz,* 1996 WL at

*7.

Unfortunately for plaintiff, the evidence in this case reveals that neither PHICO nor CompServices had any decision-making authority whatsoever with regard to his employment. They did not fire plaintiff or refuse him an accommodation. PHICO ceased to be involved in any way after December 1997, and it is not at all clear that plaintiff is complaining about anything that occurred during PHICO's tenure. The only act attributable to CompServices is its referral of plaintiff for an independent medical examination, which concluded that he was able to return to work, at least on a limited basis. Plaintiff apparently contends that his actual return to work was unduly delayed (from June to September 1999), but there is no evidence that CompServices caused the delay. Even if it had, it is ludicrous to suppose that by furnishing to the Commonwealth defendants the information that plaintiff was fit to return to work, CompServices was discriminating against him on the basis of his disability. In short, both PHICO and CompServices were merely conduits for the information and paperwork incident to the administration of a workers' compensation claim, and are entitled to summary judgment on plaintiff's ADA claims.

Plaintiff's PHRA claim against CompServices must also fail, for the reasons expressed in this Court's Memorandum and Order dated July 13, 2000 (dismissing the PHRA claim asserted against PHICO because the PHRA does not define "employer" to include an "agent" thereof). An Order follows.

ORDER

AND NOW, this 31st day of May, 2001, IT IS ORDERED:

1. The motion for summary judgment of defendants the

Commonwealth of Pennsylvania and Donald T. Vaughn is GRANTED.
2. The motion for summary judgment of defendant PHICO Services Company is GRANTED.
3. The motion for summary judgment of defendant CompServices, Inc. is GRANTED.
4. Judgment is entered against plaintiff and in favor of all defendants.

ORDER

AND NOW, this 5th day of June, 2001, IT IS ORDERED:

1. This Court's Order dated May 31, 2001 is VACATED.

2. Plaintiff's claims against the Commonwealth of Pennsylvania and Donald T. Vaughn are DISMISSED for lack of subject matter jurisdiction.

3. The motions for summary judgment filed by defendants PHICO Services Company and CompServices, Inc. are GRANTED.

4. Judgment is entered in favor of defendants PHICO Services Company and CompServices, Inc., and against the plaintiff.

5. The Clerk of Court is directed to close this file.

MEMORANDUM AND ORDER

Plaintiff, formerly employed as a water treatment plant supervisor at the State Correctional Institution at Graterford, brought this employment discrimination action against the Commonwealth of Pennsylvania, Graterford Superintendent Donald T. Vaughn, and Graterford's current and former worker's compensation administrators, CompServices, Inc. and PHICO Services Company. By Memorandum and Order dated May 31, 2001 (as amended by Order dated June 5, 2001), I dismissed plaintiff's claims against defendants the Commonwealth of Pennsylvania and Donald T. Vaughn for lack of subject matter jurisdiction, having concluded, *inter alia,* that plaintiff's claims against these defendants pursuant to the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.,* and the Rehabilitation Act, 29 U.S.C. § 701 *et seq.,* were barred by the Eleventh Amendment. I also granted summary judgment in favor of PHICO and CompServices.

Plaintiff has moved for reconsideration, apparently based solely on his disagreement with my interpretation of the law. Plaintiff urges that I reconsider my holding that he may not maintain an *Ex parte Young* action for injunctive relief against defendant Vaughn in his official capacity as Superintendent of Graterford, given that there was no evidence of any action with regard to plaintiff--unconstitutional or otherwise--taken by this defendant. I specifically addressed this issue:

> The question remains whether plaintiff may still have a viable ADA claim against the Commonwealth via an action against the individual defendant, Superintendent Vaughn, pursuant to *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). In a footnote to its opinion in *Garrett,* the Supreme Court stated:

> Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*. In addition, state laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress.

Garrett, 531 U.S. at --- n.9, 121 S.Ct. at 968 n. 9 (citation omitted). Since plaintiff also seeks prospective injunctive relief--reinstatement--he believes that he can maintain an *Ex parte Young* action against defendant Vaughn. The Commonwealth, anticipating this argument, asserts that the footnote is *dicta*. More significant is the fact that even were I to read the Second Amended Complaint to plead an ADA claim explicitly against Superintendent Vaughn, there is no individual, or supervisor, liability under the ADA. *See Lantz v. Hospital of the Univ. of Pa.*, C.A. No. 96-2671, 1996 WL 442795, at *6 (E.D.Pa. July 30, 1996).

Koslow v. Commonwealth of Pa., C.A. No. 97-5951, slip op. at 3, --- F.Supp.3d ----, ----, 2001 WL 915246 (E.D.Pa. May 31, 2001). Moreover, I held that Title II of the ADA has no application to employment discrimination claims based on disability in the first instance. *See id.* at ---- - ----, slip. op. at 2-3. I recognize that my colleague Judge Schiller recently reached the opposite conclusion in

Frederick v. Department of Public Welfare, 157 F.Supp.2d 509, ---- - ----, slip op. at 34-35 (E.D.Pa.2001), and that the issue is by no means free from doubt. Its ultimate resolution, however, is properly within the purview of the Court of Appeals.

An Order follows.

ORDER

AND NOW, this 31st day of July, 2001, IT IS ORDERED that plaintiff's motion for reconsideration is DENIED.

(2)

Supreme Court U.S.
FILED
JAN 27 2003
OFFICE OF THE CLERK

No. 02-801

In the Supreme Court of the United States

PENNSYLVANIA DEPARTMENT OF CORRECTIONS,
PETITIONER

v.

GEORGE KOSLOW, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

RALPH F. BOYD, JR.
Assistant Attorney General

JESSICA DUNSAY SILVER
SARAH E. HARRINGTON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

15 pp

QUESTION PRESENTED

Whether petitioner is subject to suit for damages for disability discrimination under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, because it waived its Eleventh Amendment immunity when it applied for and accepted federal financial assistance.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Alden v. *Maine*, 527 U.S. 706 (1999)	6
Atascadero State Hosp. v. *Scanlon*, 473 U.S. 234 (1985)	2
Barnes v. *Gorman*, 536 U.S. 181 (2002)	2
Buckley v. *Valeo*, 424 U.S. 1 (1976)	7
Chandler v. *Lovell*, No. 02-545 (Jan. 13, 2003)	4
College Sav. Bank v. *Florida Prepaid Post-secondary Educ. Expense Bd.*, 527 U.S. 666 (1999)	6, 9
Dolan v. *City of Tigard*, 512 U.S. 374 (1994)	7
Douglas v. *California Dep't of Youth Auth.*, 271 F.3d 812, opinion amended, 271 F.3d 910 (9th Cir. 2001), cert. denied, 122 S. Ct. 2591 (2002)	5
Frost & Frost Trucking Co. v. *Railroad Comm'n*, 271 U.S. 583 (1926)	7-8
Garcia v. *State Univ. of N.Y. Health Sci. Ctr.*, 280 F.3d 98 (2d Cir. 2001)	5
Hawaii v. *Vinson*, cert. denied, No. 01-1878 (Jan. 13, 2003)	4
Jim C. v. *United States*, 235 F.3d 1079 (8th Cir. 2000), cert. denied, 533 U.S. 949 (2001)	5
Litman v. *George Mason Univ.*, 186 F.3d 544 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000)	5

Cases—Continued: Page

New York v. *United States*, 505 U.S. 144 (1992) 8
Nihiser v. *Ohio Envtl. Prot. Agency*, 269 F.3d 626 (6th Cir. 2001), cert. denied, 122 S. Ct. 2588 (2002) 5
Ohio Envtl. Prot. Agency v. *Nihiser*, cert. denied, 122 S. Ct. 2588 (2002) 4
Olmstead v. *L.C.*, 527 U.S. 581 (1999) 2
Pederson v. *Louisiana State Univ.*, 123 F.3d 858 (5th Cir. 2000) 5
Petty v. *Tennessee-Mo. Bridge Comm'n*, 359 U.S. 275 (1959) 7, 8
Robinson v. *Kansas*, 295 F.3d 1183 (10th Cir. 2002) 5
Sandoval v. *Hagan*, 197 F.3d 484 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001) 5
South Dakota v. *Dole*, 483 U.S. 203 (1987) 5, 9
Stanley v. *Litscher*, 213 F.3d 340 (7th Cir. 2000) 5
Thomas v. *Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981) 7
Wyman v. *James*, 400 U.S. 309 (1971) 7
Young, Ex parte, 209 U.S. 123 (1908) 3

Constitution and statutes:

U.S. Const.:
Art. I 8
§ 8, Cl. 1 (Spending Clause) 4, 7, 9
Amend. I 7
Amend. XI 3, 4, 5, 6, 7
Amend. XXI 9
Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*:
Tit. I, 42 U.S.C. 12111-12117 3
Tit. II, 42 U.S.C. 12131-12165 3
Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003(a), 100 Stat. 1845 2
Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*:
§ 504, 29 U.S.C. 794 ..... 3, 4, 6

Statutes—Continued:

	Page
§ 504(a), 29 U.S.C. 794(a)	2
§ 505(a), 29 U.S.C. 794a(a)	2
42 U.S.C. 2000d-7	2
42 U.S.C. 2000d-7(a)	2, 4

In the Supreme Court of the United States

No. 02-801

PENNSYLVANIA DEPARTMENT OF CORRECTIONS,
PETITIONER

v.

GEORGE KOSLOW, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 302 F.3d 161. The opinion of the district court (Pet. App. 38a-49a) is reported at 158 F. Supp. 2d 539.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2002. The petition for a writ of certiorari was filed on November 19, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. Section 504(a) of the Rehabilitation Act of 1973 prohibits any "program or activity receiving Federal financial assistance" from "subject[ing any person] to discrimination" on the basis of disability. 29 U.S.C. 794(a). Individuals have a private right of action for damages against entities that receive federal funds and violate that prohibition. See 29 U.S.C. 794a(a); *Barnes* v. *Gorman*, 536 U.S. 181 (2002); *Olmstead* v. *L.C.*, 527 U.S. 581, 590 n.4 (1999).

In 1985, this Court held that the text of Section 504 was not sufficiently clear to evidence Congress's intent to condition federal funding on a waiver of Eleventh Amendment immunity for private damage actions against state entities. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246 (1985). In response to *Atascadero*, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003(a), 100 Stat. 1845. Section 2000d-7(a) provides, in relevant part:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794] * * *.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

2. In October 1988, respondent George Koslow was hired by petitioner Pennsylvania Department of Corrections as a water treatment plant supervisor for the State Correctional Institute in Graterford, Pennsylvania. The Correctional Institute is a state prison receiving federal funds. Pet. App. 3a. In 1995, Koslow injured his lower back while working and thereafter requested relief from performing certain tasks at work. *Ibid.* His employer responded that he must either return to work or be placed on workers' compensation leave. *Ibid.* Koslow chose to return to work, remaining in a position that required him to perform certain functions he was unable to accomplish due to his injury. *Ibid.* In February 2000, Koslow's employer fired him because he was unable to perform "essential functions" of his job. *Id.* at 3a-4a. Koslow filed suit against petitioner, asserting claims under, *inter alia*, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, based on petitioner's alleged failure to provide a reasonable accommodation for Koslow's disability.[1] Pet. App. 38a.

The district court held that Section 504 does not validly abrogate States' Eleventh Amendment immunity to private damages suits and that a State does not

---

[1] Koslow also filed claims under Titles I and II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12111-12117, 12131-12165. The district court dismissed both claims as barred by the Eleventh Amendment. Pet. App. 39a-40a. Koslow did not appeal the dismissal of his Title II claim. See Pet. App. 5a n.3. He did appeal the dismissal of his Title I claim, and the court of appeals held that Koslow could pursue that claim for prospective injunctive relief against state officials in their official capacities under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). Pet. App. 27a-32a. Petitioner has not challenged that ruling in this Court.

waive its immunity by applying for and accepting federal financial assistance. Pet. App. 41a-44a.

3. Koslow appealed. The court of appeals reversed the district court's holding on Section 504.[2] Pet. App. 1a-37a. The court found that the plain language of Section 504 puts States on notice that, by accepting federal financial assistance, they waive their immunity under the Eleventh Amendment to private damages suits. *Id.* at 14a-18a. The court also rejected petitioner's contentions that conditioning the receipt of federal funds on a State's waiver of Eleventh Amendment immunity constituted an "unconstitutional condition[]," *id.* at 19a-22a, and that Section 504 is not valid Spending Clause legislation because the conditions placed upon federal funds are unrelated to the purpose of those funds, *id.* at 23a-26a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. This Court recently denied petitions for writs of certiorari in *Hawaii* v. *Vinson*, No. 01-1878 (Jan. 13, 2003), *Chandler* v. *Lovell*, No. 02-545 (Jan. 13, 2003), and *Ohio Environmental Protection Agency* v. *Nihiser*, 122 S. Ct. 2588 (2002) (No. 01-1357). Those cases presented legal claims virtually identical to that presented by petitioner. Accordingly, further review is not warranted.

Section 2000d-7(a) of Title 42 provides that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in

---

[2] The United States moved to intervene in the court of appeals for the purpose of defending the constitutionality of Section 504 as applied to the States, and the court granted that motion on November 23, 2001.

Federal court for a violation of section 504 of the Rehabilitation Act of 1973." 42 U.S.C. 2000d-7(a). Petitioner does not dispute that, when it applied for and received the federal financial assistance at issue in this case, it had been put on clear notice of the conditions Congress placed on those funds, including the requirement that a state recipient waive its immunity under the Eleventh Amendment.[3] Nor does petitioner contend that the condition Congress has placed on the receipt of federal funds is not "related" to the funds, as required under *South Dakota* v. *Dole*, 483 U.S. 203 (1987). Rather, petitioner contends (Pet. 10-15) that Congress has not validly conditioned a State's receipt of federal funds on the State's waiver of Eleventh Amendment immunity because placing such a condition on the

---

[3] The courts of appeals have uniformly held that Section 2000d-7 unambiguously conditions receipt of federal funds on a waiver of Eleventh Amendment immunity. See *Litman* v. *George Mason Univ.*, 186 F.3d 544, 553-554 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000); *Nihiser* v. *Ohio Envtl. Prot. Agency*, 269 F.3d 626, 628 (6th Cir. 2001), cert. denied, 122 S. Ct. 2588 (2002); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Jim C.* v. *United States*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001); *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820, opinion amended, 271 F.3d 910 (9th Cir. 2001), cert. denied, 122 S. Ct. 2591 (2002); *Robinson* v. *Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002); *Sandoval* v. *Hagan*, 197 F.3d 484, 493 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001). Even the Second Circuit, which has held that the application of Section 504 to the States was for a time foreclosed because of concerns about notice to the States of their obligations, has not disputed that Section 504 may generally be applied to the States in the future, now that those concerns have dissipated. See *Garcia* v. *State Univ. of N.Y. Health Sci. Ctr.*, 280 F.3d 98, 113-115 (2001).

application and acceptance of funds is an unconstitutional condition.

This Court has repeatedly affirmed Congress's authority to condition a State's receipt of federal financial assistance on acceptance of federal conditions, including a waiver of Eleventh Amendment immunity. In *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), the Court expressly stated that "a waiver [of immunity] may be found in a State's acceptance of a federal grant." *Id.* at 678 n.2 (citation omitted). This Court further made clear that its recent sovereign immunity cases have done nothing to undermine well-settled authority under which Congress may condition federal "gifts," such as federal financial assistance, on a State's waiver of sovereign immunity. See *id.* at 686-687.

Petitioner argues that this Court should review this case in order to resolve what it characterizes as "tension" between the Court's unconstitutional conditions cases and statements in *Alden* v. *Maine*, 527 U.S. 706 (1999), and *College Savings Bank*. There is, however, no such tension. Waivers of sovereign immunity are governed by a separate body of law than issues involving unconstitutional conditions on the exercise of individual rights. It is not surprising, therefore, that no court of appeals—indeed, none of the appellate judges who have questioned the applicability of Section 504 to the States on other grounds—has suggested that Section 504 is invalid as applied to the States because it conflicts with this Court's unconstitutional conditions cases. See Pet. 9 (citing appellate cases upholding Section 504 and dissenting opinions). As this Court's cases cited by petitioner (Pet. 10-13) demonstrate, the Court's unconstitutional conditions cases involve the relationship between the government and private

individuals. In contrast, *Alden* and *College Savings Bank* rely on this Court's decisions in *Dole* and *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959). Those decisions expressly address the authority of the federal government to condition financial assistance to States on their agreement to waive Eleventh Amendment immunity, and those Spending Clause and federalism opinions, rather than the inapposite unconstitutional conditions cases, control the disposition of this case.[4]

As petitioner concedes (Pet. 13), this Court has never applied the unconstitutional conditions doctrine in the Eleventh Amendment context.[5] That is true even

---

[4] Petitioner contends that, under the unconstitutional conditions doctrine, "a person may not be compelled to choose between the exercise of a [constitutional] right and participation in an otherwise available public program." Pet. 13 (quoting *Thomas* v. *Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981)). But the unconstitutional conditions doctrine does not provide that Congress may *never* condition a benefit on the waiver of a constitutional right. See, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam) (federal government may condition federal money to candidates who comply with spending limits even if First Amendment protects right to spend unlimited amounts on campaign); *Wyman* v. *James*, 400 U.S. 309, 317-318 (1971) (State may condition welfare benefits on individual's consent to inspection of home without probable cause). Instead, the doctrine simply provides that "the government may not require a person to give up a constitutional right * * * in exchange for a discretionary benefit conferred by the government where the benefit sought has *little or no relationship* to the [right]." *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994) (emphasis added).

[5] The "unconstitutional conditions" doctrine has never been applied to the relations between co-sovereigns. Instead, the doctrine was developed in light of the potentially coercive relationship between a government and individual citizens dependent on certain government "privileges" for daily living. See *Frost & Frost*

though the Court has expressly addressed the validity of conditioning federal funds on the waiver of sovereign immunity.

In *Petty*, for example, this Court held that Congress could condition its grant of a gratuity under one of its Article I powers on the States' agreement to waive their Eleventh Amendment immunity from suit. *Petty* involved two States that desired to enter an interstate compact to create a bi-state agency to build bridges and operate a ferry service. Under the Constitution, Congress must consent to such compacts. Congress agreed to authorize the compact, but only if the States agreed to accept a provision that would authorize federal courts to have jurisdiction over claims against the bi-state agency. The States agreed. The Court held that the "question here is whether Tennessee and Missouri have waived their immunity under the facts of this case," and concluded that they had because "[t]he States who are parties to the compact by accepting it and acting under it assume the conditions that Congress under the Constitution attached." 359 U.S. at 277, 281-282. *Petty* could not have come out the same way if, as petitioner contends, Congress can never require a State to waive the immunity of one of its agencies in exchange for a federal benefit.

Petitioner argues (Pet. 14-15) that *Petty* is distinguishable because the "state financial and dignitary interests which underlie Eleventh Amendment immunity" were only "minimally implicated" by the compact at issue in that case. But a State's financial and dignitary

---

Trucking Co. v. *Railroad Comm'n*, 271 U.S. 583, 593 (1926). The relationship between sovereigns is of a different nature, and States are protected against federal coercion by other doctrines. See, *e.g.*, *New York* v. *United States*, 505 U.S. 144 (1992).

interests in not answering to private suits in federal court remain constant regardless of the circumstances giving rise to the suit. Indeed, in *College Savings Bank*, this Court equated Congress's exercise of its authority in *Petty* with the Spending Clause power and suggested that Congress was free to condition exercise of either power on the waiver of the State's immunity. 527 U.S. at 686-687.

Moreover, the Court assumed in *Dole* that the Twenty-First Amendment vested the States with sole authority to set the drinking age. 483 U.S. at 209. But the Court explained that the vesting of that authority in the States did not prevent Congress from attempting to influence the States' exercise of their authority through an offer or withdrawal of federal funds.

> [Our] cases establish that the "independent constitutional bar" limitation on the spending power is not, as petitioner suggests, a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, we think that the language in our earlier opinions stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power. But no such claim can be or is made here. Were South Dakota to succumb to the blandishments offered by Congress and raise its drinking age to 21, the State's action in so doing would not violate the constitutional rights of anyone.

Id. at 210-211.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

RALPH F. BOYD, JR.
Assistant Attorney General

JESSICA DUNSAY SILVER
SARAH E. HARRINGTON
Attorneys

JANUARY 2003